

Bond University

DOCTORAL THESIS

Neurodiversion: incorporating frontal lobe rehabilitation treatment for impulse-control management in the rehabilitation of criminal offenders in Australia

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**‘NEURODIVERSION’: INCORPORATING FRONTAL LOBE
REHABILITATION TREATMENT FOR IMPULSE-CONTROL
MANAGEMENT IN THE REHABILITATION OF CRIMINAL OFFENDERS
IN AUSTRALIA**

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of the degree of Doctor of Philosophy
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ABSTRACT

This thesis examines the legal theoretical and practical implications of the incorporation of frontal lobe rehabilitation treatment (hereinafter ‘FLRT’) for impulse-control management in the rehabilitation of criminal offenders, with a view to achieving an overall reduction in crime (both in prison population and recidivism).

An initiative born of ‘neurolaw’ — an emergent area combining neuroscience (the empirical study of the brain and nervous system) with law — FLRT involves the non-invasive detection of brain structure and function. Based on the prevalence of poor impulse-control among criminal offenders, the treatment allows users to strengthen the influence of their prefrontal cortex, which specializes in long-term decision-making and impulse-control. FLRT utilizes real-time brain imaging to monitor a person’s brain activity when resisting a particular stimulus. Neural activity is visually displayed in a scanner and shown directly to an individual so that person can attempt to modify it. By strengthening the neural pathways concerned with long-term consideration and control over impulsivity, FLRT enables offenders to receive neurofeedback to retrain their brains towards pro-social behaviour.

Consonant with the theory of therapeutic jurisprudence — ‘the study of the role of the law as a therapeutic agent’ⁱ — FLRT emerges from the union of neuroscience and diversion from punishment into treatment: ‘NeuroDiversion’. It is argued that responsible incorporation of this rehabilitative mechanism advances the therapeutic jurisprudence agenda and its attendant concepts. Promoting a rehabilitative rather than a punitive response to criminal behaviour, therapeutic jurisprudence scholarship is concerned with therapeutic outcome-maximization through collaborative treatment and individual rehabilitation to further the well-being of the offender.

ⁱ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

The central analysis of the thesis examines existing court-mandated opportunities for offender-rehabilitation through mental health diversionary mechanisms and the regular criminal justice system in Australia. FLRT-utilization for categorized impulse-control management within this existing framework is then explicated. The emphasis on mental health diversion courts specifically is in recognition of the prevalence of mental illness among offenders and the implication of impulsivity as a specific diagnostic criterion in many mental disorders.

This thesis argues for diversifying FLRT by widening its jurisdictional ambit beyond the existing framework. Suggestions to fill the gap for treating someone suffering from poor impulse-control in the absence of a mental illness are proffered. Amendments to sentencing protocols for inclusion of FLRT as part of court-mandated rehabilitative treatment, not as full diversion, for major indictable offences in higher courts are advocated. The use of FLRT in tribunals and other diversionary schemes, including police diversion, drug diversion and indigenous-specific diversionary programs is promoted. Youth offenders may also benefit from FLRT — in a diversionary capacity, as well as in detention and post-release. The value of FLRT in adult custodial programs and post-release programs is also acknowledged.

Diverting offenders from the criminal justice system into treatment for impulse-control management directly targets the significance of impulsivity in the aetiology of offending. NeuroDiversion is proffered as a means to enhance the rehabilitative ideal of therapeutic jurisprudence by bolstering the rehabilitative efforts of court systems, providing people with an opportunity to receive more informed sentencing, counselling, and rehabilitation, and ultimately increasing the likelihood of staying out of the prison system in support of productive societal reintegration.

DECLARATION

This thesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy. This thesis represents my own original work towards this research degree and contains no material that has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signed _____
Emma V Cooter

Date _____

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Woodbridge v The Queen (2010) 208 A Crim R 503

GLOSSARY

ACC	Anterior Cingulate Cortex
BOLD	Blood Oxygenation Level Dependent
C1	Category One (Facet of Personality — poor impulse-control in the absence of a defined mental disorder)
C2	Category Two (Impulse-Control Disorder — poor impulse-control as a defined mental disorder)
C3	Category Three (Poor impulse-control as a diagnostic criterion for a mental disorder)
C4	Category Four (Poor impulse-control as an additional significant problem to a mental disorder)
DSM-5	<i>Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition</i>
FLRT	Frontal Lobe Rehabilitation Treatment
fMRI	Functional Magnetic Resonance Imaging
GLM	Good Lives Model of Offender-Rehabilitation
GLM-FM	Good Lives Model of Forensic Mental Health
GNG	Go/No-Go Impulse-Control Task
MHDCts	Mental Health Diversion Courts
MRI	Magnetic Resonance Imaging
NeuroDiversion	The union of neuroscience to diversion from punishment into treatment
Neurolaw	The intersection of neuroscience and law
Neuroplasticity	Changes in neural pathways and synapses
PFC	Prefrontal Cortex
RNR Model	Risk-Need-Responsivity Model of Offender-Rehabilitation
rt-fMRI	Real-Time Functional Magnetic Resonance Imaging
vmPFC	Ventromedial Prefrontal Cortex

‘Educate your children to self-control, to the habit of holding passion and prejudice and evil tendencies subject to an upright and reasoning will, and you have done much to abolish misery from their future and crimes from society.’

— Benjamin Franklin

‘Self-control might be as passionate and as active as the surrender to passion ...’

— W Somerset Maugham, *Of Human Bondage*

‘The enemy is within the gates; it is with our own luxury, our own folly, our own criminality that we have to contend.’

— Marcus Tullius Cicero

CHAPTER 1

INTRODUCTION

I THESIS ENQUIRY

The topic of this thesis, ‘NeuroDiversion’¹ integrates and synthesises themes and knowledge from within the following:

- the emergent area of neurolaw, reflecting the intersection of neuroscience and law;
- the prevalence of mental illness among offenders;
- the role of impulse-control in offending;
- the ineffectiveness of incarceration based on recidivism rates; and
- Mental Health Diversion Courts (hereinafter ‘MHDCts’), which are predicated on therapeutic jurisprudence and advocate offender-rehabilitation and societal reintegration.

This thesis seeks to examine the theoretical and practical implications of the incorporation of frontal lobe rehabilitation treatment (hereinafter ‘FLRT’) for impulse-control management in the rehabilitation of criminal offenders, with a view to achieving an overall reduction in crime (both in prison population and recidivism).

An initiative born of ‘neurolaw’ — an emergent area combining neuroscience (the empirical study of the brain and nervous system) with law — FLRT involves the non-invasive detection of brain structure and function. Based on the prevalence of poor impulse-control among criminal offenders, the treatment allows users to strengthen the influence of their prefrontal cortex, which specializes in long-term decision-making and impulse-control. The treatment is designed to improve long-term consideration and

¹ A portmanteau created by the author combining ‘neuroscience’ and ‘diversion’, pertaining specifically to diversion from punishment into rehabilitative treatment.

control over impulsivity, to enable offenders to receive ‘neurofeedback’ to retrain their brains towards pro-social behaviour, thereby reducing their proclivity toward criminal behaviour and offending.

Consonant with the theory of therapeutic jurisprudence — ‘the study of the role of the law as a therapeutic agent’² — FLRT arises from the union of neuroscience and diversion from punishment into treatment: hence the term ‘NeuroDiversion’. This thesis argues that responsible incorporation of this rehabilitative mechanism advances the therapeutic jurisprudence agenda and its attendant insights, concepts and benefits.

A *The Current Problem Stated*

The impetus for FLRT was born out of recognition of over-crowding in prisons and high recidivism rates³ — matters that problematically pervade both the Australian⁴ and the American legal systems. The United States of America is the ‘incarceration leader of the world’,⁵ which is extremely expensive in both monetary and human terms.⁶ This thesis examines a potential strategy for enhancing Australian offender-rehabilitative mechanisms, with a view to ultimately contributing to the current policy trend⁷ of

² David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

³ David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 161.

⁴ J Ogloff, ‘Identifying and Accommodating the Needs of Mentally Ill People in Gaols and Prisons’ (2002) 9(1) *Psychiatry* 1; Tony Butler and Stephen Allnutt, ‘Mental Illness Among New South Wales’ Prisoners’ (State Health Publication No (CHS) 030147, New South Wales Corrections Health Service, 2003).

⁵ Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (New Press, 2013); A Liptak, ‘US Prison Population Dwarfs That of Other Nations’, *New York Times* (online), 23 April 2008 <<http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>>.

⁶ Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61, 73; M R Fondacaro and M J O’Toole, ‘American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime’ (2015) *New Criminal Law Review* (forthcoming).

⁷ See Eric Holder, ‘Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates’ (Speech delivered at the Annual Meeting of the American Bar Association’s House of Delegates, San Francisco, 12 August 2013); Department of Justice, ‘Smart on Crime: Reforming the Criminal Justice System for the 21st Century’ (Report, Department of Justice, August 2001) 4.

diverting offenders from prison. In the impassioned words of Eric Holder, Attorney-General of the United States of America:

this is our solemn obligation, as stewards of the law, and servants of those whom it protects and empowers: ... [t]o fight for the sweeping systemic changes we need.⁸

This thesis identifies the utility of FLRT in both mainstream courts⁹ and diversionary schemes or problem-solving courts, which are underpinned by the concept of therapeutic jurisprudence. The emphasis on MHDCts specifically is twofold: the prevalence of mental illness among offenders;¹⁰ and the notion that although poor impulse-control is not in itself a mental illness, impulsivity is implicated as a specific diagnostic criterion in many mental disorders and/or is considered an additional significant problem for someone with a mental disorder. Relevantly, this thesis also identifies the (lack of) existing provisions in the regular criminal justice system for treating someone suffering from poor impulse-control in the absence of a mental illness that is sufficiently serious to qualify them for regular diversionary processes.

B *Previous Solutions to the Problem*

Rehabilitation, upon which there is a growing emphasis,¹¹ as opposed to incarceration — ‘a spectacular failure in terms of deterrence and rehabilitation’¹² — is a more cost-

⁸ Eric Holder, ‘Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates’ (Speech delivered at the Annual Meeting of the American Bar Association’s House of Delegates, San Francisco, 12 August 2013).

⁹ Reference to the regular criminal justice system or mainstream courts refers in the main to Magistrates’ Courts or courts of summary jurisdiction, and where specified, to District and Supreme level Courts.

¹⁰ David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 163.

¹¹ See David B Wexler and Michael S King, ‘Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence’ (Discussion Paper No 10-46, James Rogers College of Law, University of Arizona, 2011); David B Wexler, ‘Robes and Rehabilitation: How Judges Can Help Offenders “Make Good”’ (2001) 38 *Court Review* 20; David B Wexler, ‘Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defence Lawyer’ (2005) 17 *Saint Thomas Law Review* 743; Eric Holder, ‘Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates’ (Speech delivered at the Annual Meeting of the American Bar Association’s House of Delegates, San Francisco, 12 August

effective solution in the long term.¹³ However, the question of how to rehabilitate mentally ill offenders has remained problematic. The United States of America typifies the costly and deleterious effects¹⁴ of these commonalities. It stands to reason that:

Many critics, including judges, are eager to find better approaches for dealing with the mental health offender problems that are implicated in such a large part of the criminal courts. They are also eager to find new diagnostic and prediction tools that can enable society to do a better job distinguishing between those for whom some treatment model may work and those for whom incarceration is the best option. Current approaches and explanations are not doing the job.¹⁵

Various jurisdictions around the world have responded with measures aimed at diverting individuals with mental illnesses away from the criminal justice system.¹⁶ Examples of such alternative criminal justice processes are MHDCts and diversion programs.¹⁷ In the United States of America alone there are 280¹⁸ mental health diversion courts in operation. MHDCts are a product of therapeutic jurisprudence scholarship, which promotes a rehabilitative rather than a punitive response to criminal behaviour.¹⁹

For offenders suffering from a mental impairment,²⁰ MHDCts ascertain the reasons behind the individual's criminal behaviour and offer treatment programs to address his or her offending, thereby creating alternative sentencing options for the judiciary. Such

2013) and Department of Justice, 'Smart on Crime: Reforming the Criminal Justice System for the 21st Century' (Report, Department of Justice, August 2001).

¹² T J Dawe, 'Are You Controlled By Your Inner Pigdog? — The Neurobiology of Choice' *Beams and Struts* (online), 13 March 2012 <<http://www.beamsandstruts.com/articles/item/842-pigdog>>.

¹³ David M Eagleman and Sarah Isgur Flores, 'Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science' (2012) *Law of the Future Series No 1* 161, 161 and 165.

¹⁴ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 73.

¹⁵ Ibid.

¹⁶ Elizabeth Richardson and Bernadette McSherry, 'Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry* 249, 249.

¹⁷ Australian Institute of Criminology, 'Court-Based Mental Health Diversion Programs' (Tipsheet No 20, Australian Institute of Criminology, June 2011) 1.

¹⁸ Loraine Lim and Andrew Day, 'Mental Health Diversion Courts: Some Directions for Further Development' (2013) 20(1) *Psychiatry, Psychology and Law* 36, 36.

¹⁹ Richard Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* in Elizabeth Richardson, 'Mental Health Courts and Diversion Programs for Mentally Ill Offenders: The Australian Context' (Paper presented at the Annual IAFMHS Conference, Vienna, Austria, 14–16 July 2008).

²⁰ A 'mental impairment' includes 'a mental illness, an intellectual disability, or a disability or impairment of the mind resulting from senility' in accordance with the *Criminal Law Consolidation Act 1935* (SA) s 269A.

courts meet the needs of individuals who have committed minor and summary offences. By facilitating the involvement of community-based service providers in addressing the behaviours linked to the offending, MHDCt treatment programs engage the criminal justice system with the health and disability service system.²¹

C *Thesis Solution*

There is a growing body of research in neuroscience that promises significant potential for offender-rehabilitation. Indeed, it has been argued that ‘this intersection of different technologies, analytic methods, and legal contexts may ultimately allow for a more effective and fair legal system’.²² Presently, no guide exists for the theoretical and practical matters that should be considered when determining whether and how this emergent scientific research is to be incorporated in the legal arena: ‘it remains unclear how the legal system — at the courtroom, regulatory, and policy levels — will resolve the many challenges that new neuroscience applications raise’.²³

The neural understanding of behaviours has the potential to redefine this rehabilitation, tackle recidivism and address mental illness in offenders. A new model of treatment is facilitated through the concept of neuroplasticity and interpreted through neuroimaging. Neuroplasticity refers to the plasticity or changeability in neural pathways and synapses due to changes in behavioural, environmental and neural processes. No longer is the brain considered a physiologically static organ; both its structure and functional organization can change. Neuroscientific research has shown that humans possess the ability to rewire their brain by re-sculpturing how they think (and behave) through conscious effort and ‘neurological exercises’.²⁴

²¹ Emma Cooter, *Therapeutic Jurisprudence: From Theory Ex Libris to Law In Actu A Comparative Analysis of the Effective Performance of the Mental Health Diversion Courts in Adelaide, South Australia and Broward County, Florida* (Master of Comparative Laws Thesis, The University of Adelaide, 2009) 2.

²² Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 351.

²³ Ibid.

²⁴ Leanne Houston and Amy Vierboom, ‘Neuroscience and Law: Australia’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 11, 39.

Neuroimaging enables the study of the ‘structure and function of living brains in situ, with hitherto-unprecedented detail’.²⁵ Viewing neural activity²⁶ provides insights into the psychology and cognition of the brain, as well as a deeper insight into thought processes. Behavioural testing and neuroimaging evidence offer a potentially accurate method of predicting human behaviour.²⁷

This thesis thus advocates FLRT as a treatment in keeping with the Good Lives Model (GLM) of offender-rehabilitation and then identifies the utility of FLRT in mainstream courts and diversionary schemes or problem-solving courts as underpinned by therapeutic jurisprudence.

1 *Frontal Lobe Rehabilitation Treatment*

The frontal lobe is located in the area of the brain that is responsible for, among other things, impulse-control and long-term decision-making. The ‘prefrontal work-out’,²⁸ as termed by neuroscientist Dr David Eagleman, capitalises on the ‘inner parliament’²⁹ of the brain and is designed to cultivate ‘reflection before action’.³⁰ This ‘rehabilitative strategy gives the frontal lobes practice in squelching short-term circuits’.³¹ It relies upon functional magnetic resonance imaging (fMRI), a neuroimaging procedure using magnetic resonance imaging (MRI) technology that measures brain activity by detecting associated changes in blood flow.³² This technique harnesses the association of cerebral blood flow and neuronal activation: when an area of the brain is in use, blood flow to that region also increases.

²⁵ Nicole A Vincent, ‘Neurolaw and Direct Brain Interventions’ (2014) 8 *Criminal Law and Philosophy* 43, 43.

²⁶ David Eagleman, Mark Correro and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

²⁷ David Eagleman, ‘The Brain on Trial’ *The Atlantic* (July/August 2011) 188.

²⁸ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 182.

²⁹ T J Dawe, ‘Are You Controlled By Your Inner Pigdog? — The Neurobiology of Choice’ *Beams and Struts* (online), 13 March 2012 <<http://www.beamsandstruts.com/articles/item/842-pigdog>>.

³⁰ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 183.

³¹ *Ibid.*

³² S A Huettel, A W Song and G McCarthy, *Functional Magnetic Resonance Imaging* (Sinauer, 2nd ed, 2009).

Developed by Assistant Professor Stephen LaConte, a pioneer in the development of real-time feedback in fMRI, and Assistant Professor Pearl Chiu, an expert in psychology and addiction who has led experiments employing the technology to cure cigarette smokers of their addiction, the ‘prefrontal work-out’ engages real-time feedback in brain imaging to facilitate this treatment.³³

2 *Impulse-Control*

Poor impulse-control is a hallmark characteristic of the majority of criminals in the prison system.³⁴ Offenders generally know the difference between right and wrong, and understand the seriousness of punishment, but are hamstrung by an inability to control their impulses and choose socially acceptable actions. ‘[T]heir actions override reasoned consideration of the future’³⁵ because ‘the frontal lobe circuits representing long-term considerations do not always win elections against short-term desire when temptation is present’.³⁶ Frontal lobe treatment is a technique to allow users to strengthen the influence of their prefrontal cortex, which, as stated above, specializes in long-term decision-making and impulse-control.³⁷ An example of ‘technological developments that allow non-invasive detection of brain activities’,³⁸ the neural activity can be shown directly to an individual so that they can see when their brain is craving, and learn how to lower that neural activity by strengthening other, long-term, decision-making mechanisms. This

³³ S LaConte et al, ‘Modulating rt-fMRI Neurofeedback Interfaces via Craving and Control in Chronic Smokers’ (Abstract, 15th Annual Meeting of the Organization for Human Brain Mapping, San Francisco, 23 June 2009); P Chiu et al, ‘Real-time fMRI Modulation of Craving and Control Brain States in Chronic Smokers’ (Abstract, 39th Annual Meeting of Society of Neuroscience, Chicago, 21 October 2009).

³⁴ H G Kennedy and D H Grubin, ‘Hot-Headed or Impulsive?’ (1990) 85 *British Journal of Addiction* 639; M S Stanford and E S Barratt, ‘Impulsivity and the Multi-Impulsive Personality Disorder’ (1992) 13 *Personality and Individual Differences* 831; David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 182.

³⁵ David M Eagleman and Sarah Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 165.

³⁶ Ibid.

³⁷ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 183.

³⁸ Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 349, 350.

frontal lobe treatment would enable offenders to receive customized ‘neurofeedback’³⁹ treatments designed to retrain their brains towards pro-social behaviour, all the while ‘the individual [is] in the driver’s seat of his own neural circuitry’.⁴⁰ ‘The approach leaves the brain intact — no drugs or surgery — and uses the natural mechanisms of brain plasticity to help the brain help itself.’⁴¹

D *Brief Overview of the Literature*

[A] revolutionary idea about the brain: the ability of mere thought to alter the physical structure and function of our gray matter.⁴²

The neologism, ‘neurolaw’,⁴³ was first coined in 1991. Combining neuroscience — the empirical study of the brain and nervous system⁴⁴ — with the law, ‘neurolaw’ places legal matters within a scientific construct. This enhances the potential for the law, which is inherently concerned with regulating human behaviour,⁴⁵ to be informed by neuroscientific explanations of human behaviour arising from brain activity.

1 *Current Neurolegal Discourse*

It is the duty of every academic to argue for the importance of their field, and to tout the recent advances and expansion that it has undergone. Despite the clichéd ubiquity of this pattern, ... neuroscience and our understanding of the functioning of the brain has undergone a particularly dramatic example of this expansion.⁴⁶

³⁹ Stephen M Laconte et al, ‘Real-Time fMRI Using Brain-State Classification’ (2007) 28 *Human Brain Mapping* 1033, 1034.

⁴⁰ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 250.

⁴¹ David M Eagleman and Sarah Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 165.

⁴² Sharon Begley, ‘The Brain: How The Brain Rewires Itself’ *Time Magazine* (online), Friday 19 January 2007

<<http://www.time.com/time/magazine/article/0,9171,1580438,00.html#ixzz2MjQR7QKA>>.

⁴³ Sherrod J Taylor, J Anderson Harp and Tyron Elliott, ‘Neuropsychologists and Neurolawyers’ (1991) 5 *Neuropsychology* 293.

⁴⁴ The Royal Society, ‘Brain Waves Module 4: Neuroscience and the Law’ (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011) 1.

⁴⁵ Ibid.

⁴⁶ Robert M Sapolsky, ‘The Frontal Cortex and the Criminal Justice System’ (2004) 359 *Philosophical Transactions of the Royal Society of London Biological Sciences* 1787, 1787.

The topography of neurolegal discourse originated from, and remains concentrated in, the United States of America. Neuroscience itself, through imaging and lesion studies, is helping to identify injuries or other impairments to functional brain systems that can be identified through scanning.⁴⁷ Damage to certain regions associated with empathy, rules-compliance, and moderating aggression or triggering inhibition has been found in subjects exhibiting antisocial behaviour. This kind of damage can be due to childhood maltreatment⁴⁸ or post-traumatic or other stressors, and can result from alcohol or other substance abuse.⁴⁹

Damage can be the result of physical trauma, as in the classic historical case of Phineas Gage.⁵⁰ Arguably the most famous patient in the history of neuropsychology, Gage was a young railroad foreman who sustained an incredible injury when a premature explosion drove a tamping iron through his left cheek and out of the vault of his skull. His prefrontal cortex ‘was selectively destroyed ... and it transformed him, virtually overnight, from a taciturn, reliable foreman’⁵¹ to being

fitful, irreverent, indulging at times in the grossest profanity (which was not previously his custom), manifesting but little deference for his fellows, impatient of restraint or advice when it conflicts with his desires A child in his intellectual capacity and manifestations, he has the animal passions of a strong man His mind was radically changed, so decidedly that his friends and acquaintances said he was “no longer Gage”.⁵²

⁴⁷ J Grafman et al, ‘Frontal Lobe Injuries, Violence, and Aggression: A Report of the Vietnam Head Injury Study’ (1996) 46 *Neurology* 1231; G G Brown and L T Eyler, ‘Methodological and Conceptual Issues in Functional Magnetic Resonance Imaging: Applications to Schizophrenia Research’ (2006) 2 *Annual Review of Clinical Psychology* 51.

⁴⁸ C S Widom, ‘Child Abuse, Neglect, and Violent Criminal Behavior’ (1989) 27 *Criminology* 251; D W Lewis, *Guilty by Reason of Insanity: A Psychiatrist Explores the Minds of Killers* (Fawcett, 1998).

⁴⁹ R F Leeman, J E Grant and M N Potenza, ‘Behavioral and Neurological Foundations for the Moral and Legal Implications of Intoxication, Addictive Behaviors and Disinhibition’ (2009) 27 *Behavioral Sciences and the Law* 119.

⁵⁰ J Harlow, ‘Passage of An Iron Bar Through the Head’ (1848) 13 *Boston Medical and Surgical Journal* 389; H Damasio et al, ‘The Return of Phineas Gage: Clues About the Brain From the Skull of a Famous Patient’ (1994) 264 *Science* 1102.

⁵¹ Malcolm MacMillan, *An Odd Kind of Fame: Stories of Phineas Gage* (First MIT Press, 2002).

⁵² J M Harlow, ‘Recovery from the Passage of an Iron Bar Through the Head’ (1868) 2 *Massachusetts Medical Society* 327.

Today, prefrontal cortex dysfunction is most relevant to legal matters, namely, when the frontal cortex is damaged.⁵³ This is because of its role in higher mental functions, such as cognition and comprehension. Since the era of Gage, extensive literature links prefrontal cortex damage with impulse-control, antisocial behaviour and criminality.⁵⁴

(a) Insanity Defence

Existing research includes the application of neuroscience in the courtroom, how neuroscience can and should be used legally, and how the law is created and applied.⁵⁵ Specific areas of investigation include the neuroscientific contribution to the insanity defence, where the claim is that the brain ‘made someone do it’. In such cases, the argument is based on an understanding that decisions are made before the accused person is able to consciously realise what is happening. More research on control and inhibition envisages further modifications to the insanity defence.⁵⁶

(b) Volition

Other areas of research include impaired functioning of the prefrontal cortex. Individual variations that impair the prefrontal cortex are detrimental to the decision-making process, and expose an individual to a greater likelihood of committing a crime that he or she would otherwise have not committed.⁵⁷ Researchers argue that contemporary neuroscience can assist lawmakers to decide whether to adopt or retain the defence

⁵³ Robert M Sapolsky, ‘The Frontal Cortex and the Criminal Justice System’ (2004) 359 *Philosophical Transactions of the Royal Society of London Biological Sciences* 1787, 1793.

⁵⁴ M Brower and B Price, ‘Neuropsychiatry of Frontal Lobe Dysfunction in Violent and Criminal Behaviour: A Critical Review’ (2001) 71 *Journal of Neurology, Neurosurgery and Psychiatry* 720; T Nyffeler and M Regard, ‘Kleptomania in a Patient with a Right Frontolimbic Lesion (2001) 14 *Neuropsychiatry, Neuropsychology and Behavioral Neurology* 73.

⁵⁵ Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61.

⁵⁶ Ibid.

⁵⁷ Robert M Sapolsky, ‘The Frontal Cortex and the Criminal Justice System’ (2004) 359 *Philosophical Transactions of the Royal Society of London Biological Sciences* 1787.

known as the ‘irresistible impulse’ defence or the ‘control’ or ‘volitional’ test for insanity.⁵⁸

(c) Brain Death

Injuries or illnesses that lead to a persistent vegetative state have come to the forefront of ethical, legal and scientific issues regarding brain death.⁵⁹ Research to determine a person’s cognitive state has helped develop an understanding of the vegetative state. Engaging fMRI technology, there is potential for medical imaging to be used to understand the implications of brain death, and to elucidate legal, scientific and ethical questions pertaining to brain death.⁶⁰

(d) Nootropics

Neurolaw has also extended its ambit to the consideration of nootropics, calling into question the legality of medications that specifically target and alter brain function⁶¹ and assessing the right to substance experimentation to modify individual cognition.⁶²

(e) Acquired Paedophilia and Drug Addiction

Thoroughly documented areas include ‘acquired paedophilia’⁶³ resulting from damage to the orbital prefrontal cortex, indicating a deficit in the acquisition of moral and social rules.⁶⁴ In relation to addiction and drugs, Eagleman anticipates the ‘[m]andated response of society through law to a convicted addict may be significantly changed when

⁵⁸ Ibid; Steven Penney, ‘Impulse Control and Criminal Responsibility: Lessons from Neuroscience’ (2012) 35 *International Journal of Law and Psychiatry* 99.

⁵⁹ David Eagleman, ‘Neuroscience and the Law’ (2008) 16(6) *Houston Lawyer* 36.

⁶⁰ A M Owen et al, ‘Detecting Awareness in the Vegetative State’ (2006) 313 *Science* 1402.

⁶¹ Cristina Lanni, ‘Cognition Enhancers Between Treating and Doping the Mind’ (2008) 57 *Pharmacological Research* 196.

⁶² Barbara Sahakian and Sharon Morein-Zamir, ‘Professor’s Little Helper’ (2007) *Nature* 1157.

⁶³ Charles Choi, ‘Brain Tumour Causes Uncontrollable Paedophilia’, *New Scientist* (online), 21 October 2002

<www.newscientist.com/article/dn2943-braintumour--uncontrollable-paedophilia.html>.

⁶⁴ S W Anderson et al, ‘Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex’ (1999) 2 *Nature Neuroscience* 1032.

considered from a neurolaw perspective'.⁶⁵ Indeed, neuroscience is providing new perspectives on addiction in the drug context⁶⁶ and upon drug courts⁶⁷ where new evidence-based practices are being applied to the post-conviction supervision and treatment for addicts.⁶⁸ These efforts are furthered by the supply of prescription drugs, such as naltrexone, 'that can, at least in many sufferers, effectively counteract the chemistry of addiction in various contexts'.⁶⁹

(f) *Lie Detection, Unconscious Bias, Adolescent Criminal Responsibility*

Neuroscientific research in the area of lie detection has analysed specific regions of the brain to uncover patterns of truth-telling, deception and false memory.⁷⁰ Further experiments have considered the presence of 'unconscious bias' and its potential use in screening jurors or judges for the presence of bias.⁷¹ Other areas of research include brain development and criminal responsibility in adolescents.⁷²

⁶⁵ David M Eagleman, Mark A Correrio and Jyotpal Singh, 'Why Neuroscience Matters for Rational Drug Policy' (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 7.

⁶⁶ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 78.

⁶⁷ J L Nolan, *Reinventing Justice: The American Drug Court Movement* (Princeton University Press, 2003).

⁶⁸ E Edmundson Jr and D McCarty, *Implementing Evidence-Based Practices for Treatment of Alcohol and Drug Disorders* (Haworth Medical Press, 2006); W R Miller, 'Disseminating Evidence-Based Practices in Substance Abuse Treatment: A Review with Suggestions' (2006) 31 *Journal of Substance Abuse Treatment* 25.

⁶⁹ R J Bonnie, 'Judicially Mandated Naltrexone Use By Criminal Offenders: A Legal Analysis' (2006) 31 *Journal of Substance Abuse Treatment* 121; Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 79.

⁷⁰ Nobuhito Abe, 'Neural Correlates of True Memory, False Memory, and Deception' (2008) (December) 18 *Cerebral Cortex* 2817.

⁷¹ Jeffrey Rosen, 'The Brain on the Stand' *New York Times* (online), 11 March 2007 <http://www.nytimes.com/2007/03/11/magazine/11Neurolaw.t.html?pagewanted=all&_r=0>.

⁷² The Royal Society, 'Brain Waves Module 4: Neuroscience and the Law' (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011) 13; Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 77.

(g) *Criminal Responsibility and Free Will*

The overwhelming majority of literature in the area of neurolaw considers matters surrounding criminal responsibility and free will. It has been argued that ‘discoveries of neuroscience undermine common assumptions about free will and, with that, assumptions about both responsibility and autonomy’.⁷³

Like Eagleman, there are those who believe that neuroscience may ultimately force us to accept a revolutionary new conception of criminal responsibility. Justice Ian Donald, chairman of the British Columbia Court of Appeal’s Education Committee, suggests that ‘[w]e might have to face up to a profound change in our concept of criminal responsibility’;⁷⁴ indeed,

the law ought to abandon concepts like responsibility and guilt, concepts that arose from a naive, pre-scientific understanding of human behavior. ... [T]he fact remains that responsibility and guilt are anachronisms, antiquated concepts that must vanish alongside our disappearing free will.⁷⁵

However, this thesis will not perpetuate the argument over the eradication of guilt and criminal responsibility. The notion of ‘a world of criminal justice in which there is no blame and only prior causes’⁷⁶ is not advanced. Stephen Morse, Professor of Law and Psychiatry at the University of Pennsylvania, suggests that causation is not an excusing condition and that neuroscience ‘is just another part of the full causal explanation of human behavior’.⁷⁷ Just because a defendant has a cause that is not under his control does not mean he is not responsible for his crime. A person can suffer from a severe and persistent mental illness and yet still, under the law, be responsible for his actions

⁷³ Tom Chivers, ‘Neuroscience, Free Will and Determinism: I’m Just A Machine’, *The Telegraph* (online), 12 October 2010 <www.telegraph.co.uk/science/8058541/Neuroscience-free-will-and-determinism-Im-just-a-machine.html>.

⁷⁴ Peter McKnight, “‘Neurolaw’ Changes the Landscape of Criminal Responsibility — Or Does It?” *Vancouver Sun* (online), 10 December 2012 <<http://www.vancouversun.com/technology/Neurolaw+changes+landscape+criminal+responsibility+does+Part/7669559/story.html>>.

⁷⁵ Ibid.

⁷⁶ Robert M Sapolsky, ‘The Frontal Cortex and the Criminal Justice System’ (2004) 359 *Philosophical Transactions of the Royal Society B: Biological Sciences* 1787, 1794.

⁷⁷ Kayt Sukel, ‘Will Neuroscience Challenge the Legal Concept of Criminal Responsibility?’ (Briefing Paper, The Dana Foundation, May 2011).

because he does not meet the legal criteria for an excuse. This thesis does not advance a ‘neuro-reductive explanation’⁷⁸ of human behaviour and criminal responsibility.

In line with the experiments of Benjamin Libet,⁷⁹ revealing human beings to be ‘helpless automatons’, neuroscientist Vilayanur Ramachandran concluded that we have not free will but rather ‘free won’t’.⁸⁰ However, the thesis will adopt the notion that brains do not commit crimes — people do.⁸¹ And even if a brain scan can confirm a particular condition, it is unlikely that it would be able to provide a strict yes or no answer regarding whether a defendant was responsible for an act.⁸² Free will approaches are not ultimately helpful in considering questions of criminal responsibility and punishment, because, in law, ‘philosophical questions of whether or not humans have free will are not relevant’.⁸³ Thus, this thesis does not subscribe to the ‘fundamental psycho-legal error’,⁸⁴ that is, the error of thinking that causation of behaviour excuses an actor from responsibility for that behaviour.

E Fertile Ground

According to Goodenough and Tucker, mental illness ‘is a field of study ripe for law and neuroscience collaboration, but, with the exception of a few bright spots, so far relatively

⁷⁸ Walter Glannon, ‘The Limitations and Potential of Neuroimaging in the Criminal Law’ (2014) 18 *Journal of Ethics* 153, 157.

⁷⁹ Benjamin Libet et al, ‘Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential) — The Unconscious Initiation of a Freely Voluntary Act’ (1983) 106 *Brain* 623; Benjamin Libet, ‘Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action’ (1985) 8 *Behavioral and Brain Sciences* 529.

⁸⁰ V S Ramachandran, *The Tell-Tale Brain: A Neuroscientist’s Quest for What Makes Us Human* (W W Norton, 2011).

⁸¹ S J Morse, ‘Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note’ (2006) 3 *Ohio State Journal of Criminal Law* 397, 400.

⁸² Kayt Sukel, ‘Will Neuroscience Challenge the Legal Concept of Criminal Responsibility?’ (Briefing Paper, The Dana Foundation, May 2011).

⁸³ The Royal Society, ‘Brain Waves Module 4: Neuroscience and the Law’ (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011) 12.

⁸⁴ Stephen Morse, ‘Culpability and Control’ (1994) 142 *University of Pennsylvania Law Review* 1587, 1592; Michael S Moore, ‘Stephen Morse on the Fundamental Psycho-Legal Error’ *Criminal Law and Philosophy*, published online 26 February 2014

<http://download.springer.com/static/pdf/438/art%253A10.1007%252Fs11572-014-9299-0.pdf?auth66=1401938880_fbd0a48e4a425ea9ab6f80ff95c08d12&ext=.pdf>.

little has occurred'.⁸⁵ The research that has taken place has often been linked to such criminally important conditions as psychopathy⁸⁶ and paedophilia.⁸⁷ What has been largely missing in neurolaw is an effort to engage with the legal problems of chronic mental illness of a less spectacular kind, such as depression, schizophrenia⁸⁸ and behavioural problems caused by brain injury. Responses by the legal system, such as mental health diversion courts, hold promise for putting this new knowledge to work in positive ways.⁸⁹

The development of tailored responses such as those advanced by mental health diversion courts⁹⁰ 'shows a desire to get away from incarceration ... as the principal weapon in the anticrime arsenal'.⁹¹ These developments had been underway before the genesis of neurolaw, but neuroscience has the potential to increase their effectiveness and accelerate their growth and influence.⁹²

Having identified fertile ground in the hitherto unharvested soil of the field of neurolaw⁹³ in relation to MHDCTs, as well as acknowledging that an 'Australian voice has been almost completely absent from this field within the international community of neurolaw

⁸⁵ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 78.

⁸⁶ K A Kiehl et al, 'Psychopathy and Semantic Processing: An Examination of the N400' (2009) 40 *Personality and Individual Differences* 293; K A Kiehl et al, 'Temporal Lobe Abnormalities in Semantic Processing by Criminal Psychopaths as Revealed by Functional Magnetic Resonance Imaging' (2004) 130 *Psychiatry Research: Neuroimaging* 27; Y Gao et al, 'Neurobiology of Psychopathy: A Neurodevelopmental Perspective' (2009) 54 *Canadian Journal of Psychiatry* 813.

⁸⁷ J M Cantor, 'Cerebral White Matter Deficiencies in Pedophilic Men' (2008) 42 *Journal of Psychiatric Research* 167.

⁸⁸ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 79.

⁸⁹ S K Erickson, J D Campbell and J S Lamberti, 'Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution' (2006) 42 *Community Mental Health Journal* 335; Council of State Governments Justice Center, *Mental Health Courts: A Primer for Policymakers and Practitioners*, Washington, DC: Bureau of Justice Assistance 2008 <<http://consensusproject.org/mhcp/mhc-primer.pdf>>.

⁹⁰ Ibid.

⁹¹ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 78.

⁹² Ibid.

⁹³ H T Greely, 'Law and the Revolution in Neuroscience: An Early Look at the Field' (2009) 42 *Akron Law Review* 687.

researchers’,⁹⁴ the novel contribution of this thesis will be in the application of documented research in the neuroscience discipline as an aid to improve the law.

A ‘neurocompatible’ criminal justice system, ‘aligned with current knowledge about human brain science and psychology’⁹⁵ would ‘translate ... biological understanding into customized rehabilitation’.⁹⁶ Such a system acknowledges different brains and utilizes specialized court systems that ‘embed expertise with ... mental illness’.⁹⁷ New rehabilitative strategies can be forged by a ‘biologically informed jurisprudence’,⁹⁸ where individual rehabilitation is customized commensurate with neuroplasticity capability. This thesis will identify suggestions in response to ‘the truly vexing problem of incorporating neuroscience responsibly into our criminal justice system’.⁹⁹ Neuroscience may provide an ‘adjunctive or supportive role’¹⁰⁰ to court-mandated treatment, yet the integrity of the law must be upheld so that it remains consistent with ‘established principles of fairness and justice’.¹⁰¹ Among similarly relevant considerations, the crux of this research lies in the reconciling of neural nuances with established legal principles, the intersection of which, original contribution to the knowledge and understanding of neurolaw is forged.

II A NOTE ABOUT METHODOLOGY

The methodology of this thesis is uncomplicated and considers law as a therapeutic agent. Differing from rigorous methodologies peculiar to other social science disciplines or pure

⁹⁴ Nicole Vincent, Wayne Hall and Jeanette Kennett, ‘Report on “Neurolaw in Australia” Workshop’ (Report, Macquarie University, July 2011) 1.

⁹⁵ David Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 170.

⁹⁶ Ibid 164.

⁹⁷ Ibid 168.

⁹⁸ David Eagleman, ‘Neuroscience and the Law’ (2008) 16(6) *Houston Lawyer* 36, 40.

⁹⁹ Steven K Erickson, ‘The Limits of Neurolaw’ (2011) 11 *Houston Journal of Health Law and Policy* 303, 319.

¹⁰⁰ Nicole Vincent, Wayne Hall and Jeanette Kennett, ‘Report on “Neurolaw in Australia” Workshop’ (Report, Macquarie University, July 2011) 4.

¹⁰¹ Steven K Erickson, ‘The Limits of Neurolaw’ (2011) 11 *Houston Journal of Health Law and Policy* 303, 319.

science disciplines, this legal methodology looks at FLRT as an initiative born of NeuroDiversification to reduce the anti-therapeutic consequences of law in this context. In the words of the late Professor Winick:

Therapeutic jurisprudence builds on the insight that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.¹⁰²

As a methodology or 'distinct paradigm of inquiry',¹⁰³ therapeutic jurisprudence is 'designed to produce scholarship useful for understanding the human impact of law in the broadest sense and with the ultimate purpose of being useful for legal reform'.¹⁰⁴ Based on this, the methodology involves the explication of incorporating neuroscience into both mainstream courts and MHDCts to enhance therapeutic outcomes. Examined are the therapeutic (and anti-therapeutic) outcomes of incorporating emergent customized neuroscientific frontal lobe rehabilitation treatment in those courts with specific reference to the implications upon legal rules, legal procedures and the role of legal actors (lawyers and judges).

It is argued that a therapeutic jurisprudential methodology represents 'a path to greater enlightenment about the law'.¹⁰⁵ In support of this, the thesis terrain comprises a mix of theoretical, doctrinal, practical and normative issues and analysis. The jurisprudential method of theoretical research, along with law reform and policy-based research, has been employed.¹⁰⁶ Both soft-copy and hard-copy sources such as scholarly articles and commentary, books, case law and legislation further inform this research.

¹⁰² Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy, and Law* 184, 185.

¹⁰³ Barbara A Budjac Corvette, 'Therapeutic Jurisprudence' (2000) 2 *Sociological Practice: A Journal of Clinical and Applied Sociology* 127, 127.

¹⁰⁴ Ibid.

¹⁰⁵ David B Wexler and Bruce J Winick, 'Patients, Professionals and the Path of Therapeutic Jurisprudence: A Response to Petrila' (1993) 10 *New York Law School Journal of Human Rights* 907, 911.

¹⁰⁶ Caroline Morris and Cian Murphy, *Getting A PhD In Law* (Hart Publishing, 2011) 30.

A *Scope*

This thesis considers mainstream courts and diversionary schemes within Australia, and due to the fact the United States of America is the lead country in neurolaw, predominantly American literature informs the analysis.

B *Structure*

The following chapter, Chapter 2, encapsulates the foundational bases of the thesis. The concept of therapeutic jurisprudence as a premise whereby the law assists an offender, which in turn assists society, is discussed. FLRT, a product of neuroscience and diversion from punishment into treatment, is considered as a means to enhance the rehabilitative ideal of therapeutic jurisprudence. The challenge posed by therapeutic jurisprudence to the regular criminal justice system, and the rule of law principles upon which it is based, are considered.

The neuroscientific basis of the thesis is then established. This includes the definition and history of neuroscience, neuroplasticity and neuroimaging technology. The frontal lobe treatment is further explored and the relevance of impulse-control to the treatment is expounded.

Consideration is then given to the relationship between impulse-control and mental illness. An analysis of the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5),¹⁰⁷ reveals four categories of impulse-control. The link between mental illness and offending is then explored.

Chapter 3 advocates FLRT as a treatment concordant with the predominant model of offender-rehabilitation, the Good Lives Model (GLM). The theory of criminal conduct

¹⁰⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013).

and the universally recognized Risk-Need-Responsivity (RNR) Model of offender-rehabilitation are also examined. The relevance of FLRT is argued with particular emphasis on the role of impulse-control in the aetiology of offending. This is identified as a shortfall in the existing system, whereby at present the importance of poor impulse-control — and its consequent treatment — in the aetiology of criminal offending is insufficiently considered. The formalities of FLRT becoming a recognized, accredited, prescribed rehabilitative treatment are also outlined.

Chapter 4 then turns to address the different options available to offenders with mental illnesses within the six States and two Territories of Australia. The role of diversion is examined, as well as the varying types of diversion. The central analysis of the thesis commences with a review of the existing court-mandated opportunities for offender-rehabilitation through mental health diversionary mechanisms and/or the regular criminal justice system in each State and Territory in Australia. FLRT-utilization (compatible with the GLM) for categorized impulse-control management within this existing framework is then explicated.

In Chapter 5, a critique of FLRT-utilization within the existing framework elucidates the argument for diversifying this therapeutic practice by widening its jurisdictional ambit. The utility of FLRT as part of court-mandated rehabilitative treatment, rather than full diversion, for major indictable offences in superior courts is advocated. The use of FLRT in tribunals that assess the continued detention of both civilly committed and forensic patients, as well as those that determine issues of mental responsibility, are also considered. Optimal FLRT-utilization may extend to other diversionary schemes, including police diversion, drug diversion and indigenous-specific diversionary programs. Youth offenders may also benefit from FLRT — in a diversionary capacity, as well as in detention and post-release. The value of FLRT in adult custodial programs and post-release programs is also advanced.

Chapter 6 considers the theoretical implications of the integration of FLRT as a neuroscientific insight. The integration of customized rehabilitation for impulse-control

management within traditional and modern conceptions of punishment and rehabilitation are assessed. Recidivism-reduction as a theoretical impetus to the scholarship is also considered. International human rights obligations and ethical considerations surrounding FLRT are also examined. Other theoretical concerns include the relevance of the rule of law, or more specifically the notion of equality before the law.

Chapter 7 contains an assessment of some practical implications of FLRT-integration. Natural justice and therapeutic justice are considered, as well as the impact of therapeutic jurisprudence concepts upon judicial integrity. Matters surrounding paternalism and coercion are addressed. Limitations, such as the prohibitive costs of brain-scanning, and criticisms of the emergent science are also addressed. Deliberated further are matters relevant to the use of fMRI equipment, data interpretation and staff-training. This chapter also emphasizes that as FLRT is not a cure for impulsivity; treatment must be on-going in order to prevent relapse.

Conclusions and recommendations are offered in Chapter 8. Particular weight is afforded to the utility of FLRT as a practical recidivism measurement. FLRT, as a derivative of NeuroDiversion, and essentially an extension of existing diversionary schemes, is advanced as a rehabilitative device for managing impulse-control in criminal offenders — an advancement that is ultimately reflective of societal maturation and legal prescience.

CHAPTER 2

CLARIFICATORY MATTERS: THESIS BASES

I INTRODUCTION

As explained in the previous chapter, this thesis proffers FLRT as the mechanism through which NeuroDiversion operates. It is under the umbrella of therapeutic jurisprudence that the incorporation of this rehabilitative mechanism is advanced and recommended. The foundational bases of the thesis discussed in this chapter primarily include, and draw upon, the concept of therapeutic jurisprudence, whereby the goal of the law is to assist the offender, which in turn will assist society at large.

This chapter begins with the history of the therapeutic jurisprudence movement, as well as its operational arm in terms of problem-solving courts, and MHDCts in particular. The concepts underpinning therapeutic jurisprudence are also explicated. The challenge posed by therapeutic jurisprudence to the regular criminal justice system, and the rule of law principles upon which it is based, are introduced, although they will be more fully elaborated in Chapter 6. Another foundational basis addressed includes the creation of neurolaw from neuroscience and law.

In addition, the role of executive functioning in the frontal lobe is explained in this chapter, with specific emphasis on impulse-control. The neuroscientific grounds to the concept of FLRT are stated and an explanation of the treatment is provided.

Finally, this chapter introduces the relationship between impulse-control and mental illness. The suggested categorization of impulse-control is informed by the DSM-5, and the discretionary ‘NeuroDiversion test’ is suggested as a means to determine the utility of FLRT for an offender suffering from poor impulse-control in the absence of a defined mental disorder. The link between mental illness and offending is also explored.

II THERAPEUTIC JURISPRUDENCE

A *Therapeutic Jurisprudence Introduced*

[A]nimate new work on the boundaries of the social sciences and the law.¹⁰⁸

Coined as a concept in 1987¹⁰⁹ and perpetuated by Professors Wexler and Winick, the interdisciplinary scholarship of therapeutic jurisprudence builds on the insight that ‘therapeutic’ is defined as promoting the advancement and well-being of the offender, the community and society.¹¹⁰ The therapeutic jurisprudential ‘lens’¹¹¹ focuses on therapeutic outcome-maximization, collaborative treatment and individual rehabilitation.

Proponents of therapeutic regard it as a ‘mechanism, vector, prism, lens’¹¹² with a perspective that ‘sets the stage for ... articulation and debate’ with the ‘potential of reinvigorating the field’.¹¹³ This means that it ‘focuses on the law’s impact on emotional life and psychological well-being’.¹¹⁴ The goal of therapeutic jurisprudence is to overcome the limitations of the adversarial model traditionally adopted by the criminal justice system, particularly in relation to people with mental health impairments, by focusing on an individual’s needs, psychological functioning and emotional well-being.¹¹⁵ Diversion is said to fall within the scope of therapeutic jurisprudence because diversionary programs attempt to help an accused person ‘develop skills that will enable

¹⁰⁸ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 594.

¹⁰⁹ David B Wexler, ‘Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence’ (1992) 16 *Law and Human Behavior* 27.

¹¹⁰ Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ in Ida Dickie, ‘Ethical Dilemmas, Forensic Psychology, and Therapeutic Jurisprudence’ (2008) 30 *Thomas Jefferson Law Review Association* 455, 456.

¹¹¹ David Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (1993) 35 *William and Mary Law Review* 279, 280.

¹¹² Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 575.

¹¹³ David B Wexler and Bruce J Winick, ‘Patients, Professionals and the Path of Therapeutic Jurisprudence: A Response to Petrila’ (1993) 10 *New York Law School Journal of Human Rights* 907, 909.

¹¹⁴ D Wexler, ‘Therapeutic Jurisprudence: An Overview’ (2000) 17 *Thomas M Cooley Law Review* 125, 125.

¹¹⁵ E Zafirakis, ‘Curbing the “Revolving Door” Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens’ (2010) 20 *Journal of Judicial Administration* 81, 84.

them to act differently in future situations where they may be at risk of committing a crime’.¹¹⁶

Beginning as a scholarly approach to mental health law, therapeutic jurisprudence has emerged as a popular mental health approach to law generally,¹¹⁷ as a ‘broad and all-encompassing concept’.¹¹⁸ This graduation from a school of thought to an ‘affirmative reform effort that advocates a particular means of delivering justice’¹¹⁹ cements its challenge to modern adversarialism — and to the rule of law itself. Considered one of the key dimensions that determines the quality and good governance of a country,¹²⁰ the rule of law embodies, and represents, the optimal functioning of the (adversarial) legal system. Therapeutic jurisprudence claims that the ‘lofty rhetoric surrounding the provision of legal services and decision-making’¹²¹ has a detrimental impact on legal stakeholders, and instead proffers ‘reforms that enable the legal system to focus more on problem-solving’.¹²²

1 *The History of Therapeutic Jurisprudence*

The history of the therapeutic movement, it has been said, ‘i[s] not a terribly satisfying theoretical one’.¹²³ Law once was regarded as a set of formal principles that ordered

¹¹⁶ J McGuire, ‘Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Justice Framework’ (2003) 4 *Western Criminology Review* 108, 110–11 in Linda Steele, ‘Enabling Justice: A Report on Problems and Solutions in Relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System’ (Report, Intellectual Disability Rights Service, May 2008) 18.

¹¹⁷ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy, and Law* 184, 184.

¹¹⁸ Shirley Abrahamson, ‘Therapeutic Jurisprudence Appeal’ (2000) 24 *Seattle University Law Review* 223, 223.

¹¹⁹ Mae C Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 540.

¹²⁰ Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, ‘Governance Matters VI: Governance Indicators for 1996–2006’ (Working Paper No 4280, World Bank, 2007) 2.

¹²¹ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 580.

¹²² Shirley Abrahamson, ‘Therapeutic Jurisprudence Appeal’ (2000) 24 *Seattle University Law Review* 223, 223.

¹²³ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous’ (2002) 29 *Fordham Urban Law Journal* 2063, 2083.

human behaviour. Under the nineteenth-century conception, judges were conceived of as state agents who merely ‘discovered’ and ‘applied’ the law in a more or less mechanical way, as though operating within a system of deductive logic.¹²⁴ Judges did not ‘make’ the law; they simply located it in the common law or in legislation, and applied it to resolve the issue at hand. Although potentially a ‘naive and artificial conception’,¹²⁵ it was against this backdrop of ‘perceived failures of traditional western-style justice processes’¹²⁶ that an alternative perspective developed. Or, as American judge and jurist Oliver Wendell Holmes mused, such ‘failures’ comprised the ‘felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men’.¹²⁷

The specific basis of law as a ‘therapeutic agent’¹²⁸ is not precisely known. However, the history of the therapeutic jurisprudence movement does reflect the works of scholars Roscoe Pound¹²⁹ and Oliver Wendell Holmes.¹³⁰ Pound, an early sociological jurist, advocated the law in action. Holmes, regarded as the founder of the realist school of jurisprudence, implored his students to view the law pragmatically. He suggested that ‘[t]he life of the law has not been logic’;¹³¹ rather, ‘it has been experience’.¹³² He then went on: ‘The law ... cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.’¹³³ By exposing the ‘fallacy of the logical form’,¹³⁴ where the law should not be viewed as a ‘series of logical deductions from pre-existing

¹²⁴ Roscoe Pound, ‘Mechanical Jurisprudence’ (1908) 8 *Columbia Law Review* 605, 607.

¹²⁵ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy, and Law* 184, 186.

¹²⁶ Meredith Rossner and David Tait, ‘Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures’ (2011) 37 *Monash University Law Review* 241, 241.

¹²⁷ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, first published 1881, 1991 ed).

¹²⁸ David B Wexler, ‘Therapeutic Jurisprudence in a Comparative Law Context’ (1997) 15 *Behavioral Sciences and the Law* 233, 233.

¹²⁹ Roscoe Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 5th ed, 1943); Roscoe Pound, ‘The Scope and Purpose of Sociological Jurisprudence’ (1912) 25 *Harvard Law Review* 489.

¹³⁰ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, first published 1881, 1991 ed).

¹³¹ *Ibid* 1.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ Oliver Wendell Holmes, ‘The Path of the Law’ in Michael Coper, ‘The Path of the Law’ (2002) 76 *Australian Law Journal* 716, 721.

rules’,¹³⁵ Holmes advocated the branching away from the strictures of ‘axioms and corollaries’, enabling law to move with the times, reflecting societal needs and advancements.

The eminent dichotomy between ‘law in books’ and ‘law in action’ is a distinction elaborated upon by Pound.¹³⁶ It further upholds the notion that the law should not be reduced to static, prescriptive rules, but rather should embody the sociology and psychology of the time. Conceiving of law as having therapeutic and anti-therapeutic consequences can be seen as a response to societal needs and trends. Pound acknowledged the prolificacy of ‘pluralistic and competing cultures’¹³⁷ and promulgated a more interventionist role for creative lawmaking. This is comparable to the inception of therapeutic jurisprudence whereby erudite lawmaking pays homage to Pound’s preoccupation with ‘unmet social needs’.¹³⁸

As Pound recognized, the common law is both a ‘body of authoritative materials’ and a ‘judicial process’. This process itself is defined by a particular cognitive disposition or ‘frame of mind’. ‘The judicial “frame of mind” endemic to the common law tradition requires a high level of restraint, discipline, craftsmanship, and careful reasoning.’¹³⁹ It is ‘a legal orientation’¹⁴⁰ that has always ‘imposed upon itself limitations’.¹⁴¹ In the light of this, Pound implored the law to reconsider such limitations and ‘look to the relationship between itself and the social effects it creates’.¹⁴²

¹³⁵ Michael Coper, ‘The Path of the Law’ (2002) 76 *Australian Law Journal* 716, 721.

¹³⁶ David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157, 159.

¹³⁷ *Ibid* 164.

¹³⁸ *Ibid* 169.

¹³⁹ James L Nolan, ‘Reinventing Justice: The American Drug Court Movement’ in Tamar Meekins, ‘Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender’ (2007) 12 *Berkeley Journal of Criminal Law* 75, 91.

¹⁴⁰ *Ibid*.

¹⁴¹ Roscoe Pound in James L Nolan, *Reinventing Justice: The American Drug Court Movement* (Princeton University Press, 2001) 91.

¹⁴² David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157, 167.

At the intersection of Holmes' and Pound's insights one might find the genesis of therapeutic jurisprudence. For here one is charged with the 'duty of weighing considerations of social advantage'¹⁴³ and warned against the 'pitfall of antiquarianism'¹⁴⁴ in order to effect meaningful change and effectively harness the pluralities of society. The insights of such movements as the sociological jurisprudence of Pound and the legal realism of jurisprudential scholar Karl Llewellyn¹⁴⁵ have advocated 'law as part of a rich tapestry of human interactions',¹⁴⁶ whereby delving beyond law's formalisms to the deeper structures within facilitates an understanding of how law functions. Familiarization with political science, economics, anthropology, sociology and psychology is also recommended. On this basis, modern approaches to law have been interdisciplinary and empirical in character. Therapeutic jurisprudence is thus in line with these interdisciplinary insights.

Although law is designed to serve various normative ends, modern scholars consider the extent to which these ends are furthered in practice. Once it is understood that rules of substantive law, legal procedures, and the roles of various actors in the legal system have either positive or negative effects on the health and mental health of the people they affect, the need to assess these therapeutic consequences is enhanced.¹⁴⁷ Unlike law and psychology and social science in law, which are empirical in their methodology and purport to have no normative agenda, therapeutic jurisprudence is normative in its orientation. It posits that the therapeutic domain is important and ought to be understood and factored into legal decision-making. Indeed, this perpetuates Pound's theory of law as a 'tool of social engineering' to be executed 'with the least waste and inefficiency'.¹⁴⁸

¹⁴³ Michael Coper, 'The Path of the Law' (2002) 76 *Australian Law Journal* 716, 721.

¹⁴⁴ Ibid 722.

¹⁴⁵ See, eg, Karl N Llewellyn, 'Some Realism About Realism — Responding to Dean Pound' (1931) 44 *Harvard Law Review*, 1222; G Edward White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America' (1972) 58 *Virginia Law Review* 999.

¹⁴⁶ Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy, and Law* 184, 186.

¹⁴⁷ Ibid 188.

¹⁴⁸ David Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 *Legal Studies* 157, 159.

2 Therapeutic Jurisprudence Operationalized

‘Problem-solving court’ is a broad term used to describe a specialist court that seeks to address the underlying issues associated with a legal problem through the use of processes such as judicial supervision of participants, a multidisciplinary team, collaborative decision-making processes, and the support of community agencies.

Problem-solving courts originated in the United States of America, as a response by individual judges.¹⁴⁹ Presented with increasing court lists, the ‘revolving door’¹⁵⁰ of offending and reoffending, and the escalating ventilation of social problems in the legal arena, judges sought a creative remedy. Wexler and Winick promoted problem-solving courts as ‘care-based judicial alternatives’ to counter ‘rising rates of incarceration and recidivism’.¹⁵¹ The call for legal reform was further strengthened by court officials’ feelings of frustration at the narrow range of sentencing options and the debilitating effects of the legal system on those involved. It was deemed that the negative effects of adversarial processes are exacerbated by ‘psychological and social dysfunction’ from the ‘retributive cycle of imprisonment and offending’.¹⁵² Proponents thus began calling adversarial legal processes ‘jurigenic’.¹⁵³ Likened to ‘iatrogenic’ processes in the health care system where some patients suffer harmful, adverse events or death, the adversarial system is deemed to have harmful psychological effects on offenders and court personnel.¹⁵⁴ In Australia, dissatisfaction with government responses to crime and their impact on offending rates, along with the need for a more cost-effective service that is

¹⁴⁹ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 38.

¹⁵⁰ Chief Judge Donald Hudson in Rita Hoover, ‘Mental Health Court Coming to Kane County’, *Chicago Tribune* (online) 11 January 2006 <http://articles.chicagotribune.com/2006-01-11/news/0601110259_1_mental-health-court-mental-illness-specialty-court>.

¹⁵¹ Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1, 2 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

¹⁵² Mark Harris, ‘The Koori Court and the Promise of Therapeutic Jurisprudence’ (2006) *eLaw Special Series* (1) 129, 130 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹⁵³ William Schma et al, ‘Therapeutic Jurisprudence: Using the Law to Improve the Public’s Health’ (2005) 33 *Journal of Law, Medicine & Ethics* 61, 61.

¹⁵⁴ Bruce J Winick and David B Wexler, ‘The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic’ (2006) 13 *Clinical Law Review* 610.

more responsive to the needs of court clients, have influenced the shift towards therapeutic jurisprudence as an innovative,¹⁵⁵ ‘new way of doing justice’.¹⁵⁶

In an effort to break the cycle of reoffending,¹⁵⁷ the therapeutic jurisprudence paradigm has moved courts away from their traditionally adversarial role towards ‘reforms that enable the legal system to focus more on problem-solving’.¹⁵⁸ This is evident in various initiatives, including the establishment of specialist, or problem-solving, courts.¹⁵⁹ Many of these specialist courts aim to reduce reoffending and, consequently, imprisonment.

Therapeutic jurisprudence underpins the practice of problem-solving courts,¹⁶⁰ focusing on the underlying medical and social issues of those who come into contact with the justice system. Such courts and programs apply practices and ‘evidence-based interventions from the behavioural sciences to effectuate change and seek innovative solutions to complex social issues’.¹⁶¹

Problem-solving courts include, inter alia, various kinds of drug courts, alcohol courts, family violence courts, mental health courts and community groups. Following their conception in the United States of America, a growing number of jurisdictions around the world have established problem-solving courts, including Australia, Brazil, Canada,

¹⁵⁵ Jacqueline Joudo, ‘Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs’ (Research and Public Policy Series No 88, Australian Institute of Criminology, 2008) 51.

¹⁵⁶ S Jeffries, ‘Transforming the Criminal Courts: Managerialism, Consumerism, Therapeutic Jurisprudence and Change’ (Scoping Paper, Australian Institute of Criminology, 2003).

¹⁵⁷ New South Wales Law Reform Commission, ‘People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion’ (Report 135, New South Wales Law Reform Commission Report, June 2012) 28.

¹⁵⁸ Shirley Abrahamson, ‘Therapeutic Jurisprudence Appeal’ (2000) 24 *Seattle University Law Review* 223, 223.

¹⁵⁹ S Jeffries, ‘Transforming the Criminal Courts: Managerialism, Consumerism, Therapeutic Jurisprudence and Change’ (Scoping Paper, Australian Institute of Criminology, 2003).

¹⁶⁰ Peggy Fulton Hora, William G Schma and John T A Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’ (1999) 74 *Notre Dame Law Review* 439, 440; Bruce J Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2003) 30 *Fordham Urban Law Journal* 1055, 1062.

¹⁶¹ Peggy Fulton Hora, ‘Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits’ (2011) 2 *Chapman Journal of Criminal Justice* 7, 7.

England, Ireland, New Zealand and Scotland. Australian problem-solving court programs have largely been the product of the involvement of the executive — and in some cases the legislature as well — with some local judicial initiatives. There are drug courts in New South Wales, Queensland, South Australia, Victoria and Western Australia. Several jurisdictions have family violence courts.¹⁶² Some have special mental health lists in magistrates' courts. Victoria has the only community court in Australia. Australian problem-solving courts have been established almost entirely in the criminal jurisdiction.

3 *Mental Health Diversion Courts (MHDCts)*

A 'practical legal innovation',¹⁶³ MHDCts are said to 'connect defendants to therapeutic interventions including rehabilitative ... mental health treatment'.¹⁶⁴ In some mental diversion health courts, for example, the prosecutor brings criminal charges and the defendant is required to choose between pursuing the traditional adversarial route or pleading guilty to the charges and accepting conditions monitored by the diversion court. If the defendant chooses to plead guilty, the conditions of court-ordered treatment can be enforced with periods of incarceration if the defendant fails to comply. An offender is subject to treatment that can promote his or her interest in ameliorating his or her disorder, as well as the societal interest in reducing the risk of recidivism. Thus, the magistrate monitors the conditions of the court order through a cooperative process between the court, the defendant and the treatment providers, which is designed to advance the convergent interests of the defendant and the public.¹⁶⁵

¹⁶² Michael S King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 153.

¹⁶³ George Ackerman, *Law and Courts: Current Perspective from InfoTrac* (Wadsworth Cengage Learning, 2011) 8.

¹⁶⁴ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* in Andrea Odegaard, 'Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System' (2007) 83 *North Dakota Law Review* 225, 227.

¹⁶⁵ Robert F Schopp, 'Pursuing Non-Adversarial Justice Within An Adversarial Structure' (2011) 37 *Monash University Law Review* 102, 102.

4 *Therapeutic Jurisprudence Concepts*

[N]ew responses to chronic social, human and legal problems . . . that have proven resistant to conventional solutions, to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the future well-being of communities.¹⁶⁶

As a ‘field of inquiry’ and not a theory, therapeutic jurisprudence possesses prominent features or concepts, rather than established principles. The idea of law as a therapeutic agent¹⁶⁷ is the concept that is central to the movement. Further features are informed by the ‘hallmarks of problem-solving justice’,¹⁶⁸ as asserted by Berman and Feinblatt, as well as the ‘tripartite framework’¹⁶⁹ for therapeutic problem-solving, as established by Wexler.

Berman and Feinblatt’s ‘hallmarks’ include the redefining of goals such that the court becomes more concerned with outcomes ‘directed at resolving issues underlying the legal problem’ rather than ‘the legal outcome and the proper process for reaching that outcome’.¹⁷⁰ The notion that judicial authority promotes compliance with court orders is considered a promising feature. Yet another hallmark is the contextualizing of problems considered by judicial officers and lawyers, widening their ambit of considerations to include ‘health, social, economic and relational aspects of the problem’.¹⁷¹ Additionally, the collaborative and creative nature of the movement promotes participation of the court team and ‘a more extensive engagement by the judicial officer with the participant’.¹⁷²

¹⁶⁶ Greg Berman and John Feinblatt, ‘Problem-Solving Courts: A Brief Primer’ (2001) 23 *Law and Policy* 125, 126.

¹⁶⁷ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii; David B Wexler, ‘Therapeutic Jurisprudence in a Comparative Law Context’ (1997) 15 *Behavioral Sciences and the Law* 233, 233.

¹⁶⁸ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 34.

¹⁶⁹ David B Wexler, ‘A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research and Practice’ (2005) 7 *Florida Coastal Law Review* 95.

¹⁷⁰ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 34.

¹⁷¹ Ibid.

¹⁷² Ibid.

Originating from the case of *United States v Riggs*,¹⁷³ the tripartite framework adopted by Wexler consists of the ‘pertinent legal landscape’, being the rules and procedures operative in a jurisdiction, the ‘available treatment and services and practices and techniques’ comprising the roles and behaviours exhibited by judges, lawyers and therapists,¹⁷⁴ and the therapeutic and anti-therapeutic impact of these. Moreover, therapeutic jurisprudence suggests that the law should seek to further therapeutic ends, but it does not suggest that therapeutic ends are the only ones that law should seek to accomplish, or the most important ends. In this way, therapeutic jurisprudence seeks to operate in accordance with rule-of-law principles. In the words of Wexler, ‘therapeutic goals should be achieved only within the limits of considerations of justice’, acknowledging that ‘law should be applied fairly, even-handedly, and non-discriminatorily’.¹⁷⁵

Simply put, the foundational concepts of therapeutic jurisprudence scholarship are based on law as a therapeutic agent, with the overarching premise of therapeutic outcome-maximization through collaborative treatment and individual rehabilitation.

III NEUROLAW

The law needs neuroscience to evolve.¹⁷⁶

As therapeutic jurisprudence scholarship promotes a rehabilitative rather than a punitive response to criminal behaviour,¹⁷⁷ studies in neurolaw could bolster the rehabilitative efforts of court systems, providing people with ‘an opportunity to receive more informed

¹⁷³ 370 F 3d 382 (4th Cir, 2004), vacated by 125 S Ct 1015 (2005).

¹⁷⁴ David B Wexler and Michael S King, ‘Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence’ (Discussion Paper No 10-46, James E Rogers College of Law, University of Arizona, 2011) 2.

¹⁷⁵ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 665.

¹⁷⁶ David Eagleman, ‘Neuroscience and the Law’ (2008) 16(6) *Houston Lawyer* 36, 37.

¹⁷⁷ Richard Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* in Elizabeth Richardson, ‘Mental Health Courts and Diversion Programs for Mentally Ill Offenders: The Australian Context’ (Paper presented at the Annual IAFMHS Conference, Vienna, Austria, 14–16 July 2008).

sentencing, counselling, and rehabilitation,¹⁷⁸ and ultimately increasing the likelihood of them staying out of the prison system. Arguably, anything that reduces recidivism and triggers to criminal activity is of therapeutic value. It is the contention of this thesis that the utility of FLRT through the creation of NeuroDiversion could thus enhance the therapeutic outcomes of the law.

‘Law’, it has been said, ‘is an inveterate intellectual scavenger from advances in other fields’,¹⁷⁹ with an ‘omnivorous taste for interdisciplinary knowledge’,¹⁸⁰ and has welcomed the influence over its field. A legitimate discipline¹⁸¹ and ‘a recognized field of study’¹⁸² with an interdisciplinary basis, neurolaw explores the effects of discoveries in neuroscience upon legal rules and standards. Drawing from neuroscience, philosophy, social psychology, cognitive neuroscience and criminology, neurolaw practitioners seek to address not only the descriptive and predictive issues of how neuroscience is and will be used in the legal system, but also the normative issues of how neuroscience should and should not be used. Neurolaw considers how neuroscience will shape future aspects of legal processes.¹⁸³

Science and law are hardly new bedfellows. Efforts to employ science to predict criminal behaviour, for example, have a somewhat disreputable history. In the nineteenth century, Italian criminologist Cesare Lombroso championed a theory of ‘biological criminality’, which held that criminals could be identified by certain physical characteristics, such as cranial size, jaw size or the bushiness of eyebrows.¹⁸⁴ Invasive measures included labotomies, eugenics, phrenology and experimental psychosurgery.¹⁸⁵

¹⁷⁸ David Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 169.

¹⁷⁹ E D Elliott, ‘The Evolutionary Tradition in Jurisprudence’ (1985) 85 *Columbia Law Review* 38.

¹⁸⁰ Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61, 62.

¹⁸¹ Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

¹⁸² Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61, 61.

¹⁸³ Eagleman, David, ‘The Brain on Trial’ *The Atlantic* (July/August 2011) 188.

¹⁸⁴ Jeffrey Rosen, ‘The Brain on the Stand’ *New York Times* (online), 11 March 2007 <http://www.nytimes.com/2007/03/11/magazine/11Neurolaw.t.html?pagewanted=all&_r=0>.

¹⁸⁵ The history of these measures, while interesting, is merely peripheral to the arguments developed in this thesis, and so, discussion of them is omitted.

Various other individual theories¹⁸⁶ have been advanced regarding criminality preceding neurolaw; however, neuroscience provides the law with a utility grounded in empirical scientific evidence, which therefore distinguishes it from previous arguably dubious science-law intersections. The data clearly suggest that there is growing interest on the part of law professors, and growing demand on the part of law reviews, for scholarship on law and the brain.¹⁸⁷ Indeed, there has been ‘broad and quickly developing interest across the academy’,¹⁸⁸ with a number of symposia on law and neuroscience being held in the United States of America over the past few years. Despite the notable infancy of the field, courses in Law and Neuroscience have been taught at a number of American law schools.¹⁸⁹

Neurolaw sagely argues that ‘[t]he science is undeniably potent’,¹⁹⁰ yet it is the case that ‘law and science are linked but distinct’,¹⁹¹ and ‘the big question is how to best use emerging insights into the human brain to ultimately accomplish the goals of law’.¹⁹² The ‘emergence and current topography of neurolegal discourse’¹⁹³ further advocates that ‘[a]lthough the law must be responsive to scientific advances, it rightfully must retain control and temper technology with the social values it incorporates’.¹⁹⁴

¹⁸⁶ Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61, 62–5.

¹⁸⁷ Francis X Shen, ‘The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw’ (2010) 38 *International Journal of Legal Information* 349; Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012).

¹⁸⁸ Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 352.

¹⁸⁹ Francis X Shen, ‘The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw’ (2010) 38 *International Journal of Legal Information* 349.

¹⁹⁰ Susan M Wolf, ‘Neurolaw: The Big Question’ (2008) 8(1) *American Journal of Bioethics* 21, 22.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Martyn Pickersgill, ‘Connecting Neuroscience and Law: Anticipatory Discourse and the Role of Sociotechnical Imaginaries’ (2011) 30 *New Genetics and Society* 27, 28.

¹⁹⁴ N Roden, ‘Trimesters and Technology: Revamping *Roe v. Wade*’ (1985) 95 *Yale Law Journal* 639, 691.

A Neuroscience

[A]t the seat of our rationality is a three-pound organ, the brain.¹⁹⁵

Neuroscience, the scientific study of the nervous system, seeks to explain how human behaviour arises from brain activity.¹⁹⁶ It has shed light on how the brain and certain mental processes operate, and research is revealing the complex links between brain activity, mental processes and behaviour.¹⁹⁷ Indeed, ‘the innumerable facets of our behavior, thoughts and experience are inseparably yoked to ... the nervous system’.¹⁹⁸

The study of the nervous system can be traced to ancient Egypt. Evidence of trepanation — the surgical practice of drilling a hole into the skull to ‘cure’ headaches or mental disorders, or relieving cranial pressure — dates back to Neolithic times and has been found in various cultures throughout the world.¹⁹⁹ Early views on the function of the brain regarded it to be a ‘cranial stuffing’. In Egypt, from the late Middle Kingdom onwards, the brain was regularly removed in preparation for mummification. The view that the heart was the source of consciousness was not challenged until the time of the Greek physician, Hippocrates. He believed that the brain was not only involved with sensation, but was also the seat of intelligence. Plato also speculated that the brain was the seat of the rational part of the soul.²⁰⁰

Studies of the brain became more sophisticated after the invention of the microscope and the development of a staining procedure by Camillo Golgi during the 1890s. The procedure used a silver chromate salt to reveal the intricate structures of individual neurons. His technique was used by Santiago Ramón y Cajal and led to the formation of

¹⁹⁵ Brent Garland (ed), *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* (Dana Press, 2004) vii.

¹⁹⁶ The Royal Society, ‘Brain Waves Module 4: Neuroscience and the Law’ (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011).

¹⁹⁷ Ibid.

¹⁹⁸ David Eagleman, ‘The Human Brain: Turning Our Minds to the Law’ *Telegraph* (online), 5 April 2011 <<http://www.telegraph.co.uk/science/science-news/8428793/The-human-brain-turning-our-minds-to-the-law.html>>.

¹⁹⁹ W Mohamed, ‘The Edwin Smith Surgical Papyrus: Neuroscience in Ancient Egypt’ [2008] *International Brain Research Organization History of Neuroscience*.

²⁰⁰ Plato, *Timaeus* (Benjamin Jowett trans, Clarendon Press, 1892).

the neuron doctrine, the hypothesis being that the functional unit of the brain is the neuron. Parallel to this research, work with brain-damaged patients by Paul Broca suggested that certain regions of the brain were responsible for certain functions. At the time, Broca's findings were seen as a confirmation of Franz Joseph Gall's theory that language was localized and that certain psychological functions were localized in specific areas of the cerebral cortex.²⁰¹

The scope of modern neuroscience has broadened to include different approaches used to study the molecular, cellular, developmental, structural, functional, evolutionary, computational and medical aspects of the nervous system. For example, cognitive neuroscience explores the areas and chemicals in the brain oriented to decision-making.²⁰² The techniques employed by neuroscientists have also expanded enormously, from molecular and cellular studies of individual nerve cells to imaging of sensory and motor tasks in the brain. It is possible to understand, in much detail, the complex processes occurring within a single neuron. Neurons are cells specialized for communication. They are able to communicate with neurons and other cell types through specialized junctions, or synapses, at which electrical or electrochemical signals can be transmitted from one cell to another. Many neurons extrude long thin filaments of protoplasm called axons, which may extend to distant parts of the body and are capable of rapidly carrying electrical signals, influencing the activity of other neurons, muscles or glands at their termination points. A nervous system emerges from the assemblage of neurons that are connected to one another.

As an intricate organ system in the body, the complexity of the nervous system resides predominantly in the brain. The human brain alone contains around one hundred billion neurons and one hundred trillion synapses; it consists of thousands of distinguishable substructures, connected to one another in synaptic networks. Due to the plasticity of the

²⁰¹ S H Greenblatt, 'Phrenology in the Science and Culture of the 19th Century' (1995) 37 *Neurosurgery* 790; M F Bear, B W Connors and M A Paradiso, *Neuroscience: Exploring the Brain* (Lippincott Williams and Wilkins, 2nd ed, 2001).

²⁰² David A Hoffman and Richard N Wolman, 'The Psychology of Mediation' (2013) 4 *Cardozo Journal of Conflict Resolution* 759, 761.

human brain, the structure of its synapses and their resulting functions change throughout life.²⁰³

B Neuroplasticity

[T]he prevailing view that we are born with a hardwired system had to be wrong. The brain had to be plastic.²⁰⁴

Neuroplasticity, known also as brain plasticity, is a term that encompasses both synaptic plasticity and non-synaptic plasticity. It refers to changes in neural pathways and synapses that are due to changes in behaviour, environment and neural processes, as well as changes resulting from bodily injury.²⁰⁵ Neuroplasticity has replaced the formerly held position that the brain is a physiologically static organ, and explores how the brain changes throughout life.²⁰⁶ Neuroplasticity occurs on a variety of levels, ranging from cellular changes due to learning, to large-scale changes involved in cortical remapping in response to injury. The role of neuroplasticity is widely recognized in healthy development, learning, memory and recovery from brain damage.

Throughout the majority of the twentieth century, the consensus among neuroscientists was that brain structure is relatively immutable after a critical period during early childhood. Until the 1970s, an accepted idea across neuroscience was that, in terms of brain function, the nervous system was essentially fixed throughout adulthood. It was also believed that it was impossible for new neurons to develop after birth.²⁰⁷ This belief has been challenged by findings revealing that many aspects of the brain remain plastic

²⁰³ B A Wandell and S M Smirnakis, 'Plasticity and Stability of Visual Fieldmaps in Adult Primary Visual Cortex' (2009) 10 *Nature Reviews Neuroscience* 873.

²⁰⁴ Michael Merzenich in Norman Doidge, *The Brain That Changes Itself: Stories of Personal Triumph from the Frontiers of Brain Science* (Scribe Publications, revised ed, 2010) 55.

²⁰⁵ A Pascual-Leone et al, 'Characterizing Brain Cortical Plasticity and Network Dynamics across the Age-Span in Health and Disease with TMS-EEG and TMS-fMRI' (2011) 24 *Brain Topography* 302.

²⁰⁶ A Pascual-Leone et al, 'The Plastic Human Brain Cortex' (2005) 28 *Annual Review of Neuroscience* 377.

²⁰⁷ Michael Merzenich in Norman Doidge, *The Brain That Changes Itself: Stories of Personal Triumph from the Frontiers of Brain Science* (Scribe Publications, revised ed, 2010) 46.

even into adulthood²⁰⁸ — or, in the words of neuroscientist Michael Merzenich, ‘plasticity exists from the cradle to the grave’.²⁰⁹ Neuroscientific research indicates that experience can actually change both the brain’s physical structure (anatomy) and its functional organization (physiology).²¹⁰

Neuroplasticity allows the neurons, or nerve cells, in the brain to compensate for injury and disease and to adjust their activities in response to new situations or to changes in their environment. Brain reorganization takes place by mechanisms such as ‘axonal sprouting’, whereby undamaged axons grow new nerve endings to reconnect neurons whose links were injured or severed. Undamaged axons can also sprout nerve endings and connect with other undamaged nerve cells, forming new neural pathways to accomplish a needed function. For example, if one hemisphere of the brain is damaged, the intact hemisphere may take over some of its functions. The brain compensates for damage by reorganizing and forming new connections between intact neurons. In order to reconnect, the neurons need to be stimulated through activity.

People can re-sculpture how they think (and behave) through conscious effort, altering their own mental wiring. The brain deletes unused pathways, yet neurological pathways remain open for the development of another thought pattern, and thus a new pathway is constructed.²¹¹ This is an example of “self-directed neuroplasticity” concluding that “the mind can change the brain”.²¹²

²⁰⁸ P Rakic, ‘Neurogenesis in Adult Primate Neocortex: An Evaluation of the Evidence’ (2002) 3 *Nature Reviews Neuroscience* 65.

²⁰⁹ Michael Merzenich in Norman Doidge, *The Brain That Changes Itself: Stories of Personal Triumph from the Frontiers of Brain Science* (Scribe Publications, revised ed, 2010) 46.

²¹⁰ J D Schaechter et al, ‘Structural and Functional Plasticity in the Somatosensory Cortex of Chronic Stroke Patients’ (2006) 129 *Brain* 2722.

²¹¹ Kennedy, Kris, *What Is Neuroplasticity?* (24 August 2009) <Helium<http://www.helium.com/items/1562606-neuroplasticity>>; B A Wandell and S M Smirnakis, ‘Plasticity and Stability of Visual Fieldmaps in Adult Primary Visual Cortex’ (2009) 10 *Nature Reviews Neuroscience* 873.

²¹² Jeffrey Schwartz in Sharon Begley, ‘The Brain: How The Brain Rewires Itself’, *Time Magazine* (online) Friday 19 January 2007, <<http://www.time.com/time/magazine/article/0,9171,1580438,00.html#ixzz2MjQR7QKA>>.

Similarly, with neuroplasticity, toxic or negative thought patterns can be changed. The method can be used to help someone find more productive thought patterns. With new reference points through questions, the person builds thought paths that bring him or her to another result. This method of thought change goes by the term ‘brain mapping’ and it offers counselors in prisons a way to help criminals develop new ways of thinking about their behaviour.²¹³

C *Neuroimaging Technology*

MRI is revolutionizing our ability to see how humans think.²¹⁴

Neuroimaging includes the use of various techniques to either directly or indirectly image the structure and function of the brain. The most common technique for measuring human brain structure and activity is MRI. Also among the most prominent technologies and disciplines are positron emission tomography (PET scan) and epigenetics.

While structural MRI produces images of brain anatomy, fMRI produces dynamic images that reflect patterns of brain activity. Both structural and functional MRI have good spatial resolution²¹⁵ and allow detailed mapping of the human brain providing insight into brain psychology and cognition of the brain. Neuroimaging, or fMRI, allows the viewing of neural activity²¹⁶ and measures the blood oxygenation level dependent (BOLD) signal in areas of the brain that are most active while a person is engaged in a given mental task.

²¹³ Kennedy, Kris, *What Is Neuroplasticity?* (24 August 2009) Helium<<http://www.helium.com/items/1562606-neuroplasticity>>.

²¹⁴ David Eagleman, ‘Neuroscience and the Law’ (2008) 16(6) *Houston Lawyer* 36, 38.

²¹⁵ Spatial resolution refers to the level of detail of an acquired image; in particular how well points close together can be distinguished from one another. MRI has spatial resolution in the order of a few millimetres, allowing intricate structures to be visible and pinpointed. This resolution is superior in comparison to contemporary neuroimaging technologies of electroencephalography (EEG) and Magnetoencephalography (MEG) taken from The Royal Society, ‘Brain Waves Module 4: Neuroscience and the Law’ (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011) 5.

²¹⁶ David Eagleman, Mark Correro and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

The technique known as real-time fMRI (rt-fMRI), or neurofeedback,²¹⁷ ‘permits simultaneous measurement and observation of brain activity during an ongoing task’.²¹⁸ The approach is similar to the biofeedback strategies of previous decades, except that it allows a view inside the skull, giving a level of precision never before possible.²¹⁹ Real-time feedback involves cutting-edge technology, its development owing to the introduction of fast computation and efficient algorithms.²²⁰ Raw data from the imaging can be reconstructed in close to real time and visually displayed in a scanner, allowing the observer to measure brain activity while the person being tested is addressing different tasks. This subsequently allows the experimenter to non-invasively study the effects of brain activity on behavioural characteristics by choosing specific tasks for the person to be tested.²²¹

This technology has the potential to enable a dramatically new level of sophisticated exploration of brain function that goes beyond modest measurements of correlations between stimuli and their associated fMRI activations.²²² In this way, neural activity can be shown directly to an individual and that person can attempt to modify it.²²³

²¹⁷ Stephen M LaConte et al, ‘Real-Time fMRI Using Brain-State Classification’ (2007) 28 *Human Brain Mapping* 1033; R Christopher deCharms, ‘Reading and Controlling Human Brain Activation Using Real-Time Functional Magnetic Resonance Imaging’ (2007) 11 *Trends in Cognitive Science* 473; Nikolaus Weiskopf et al, ‘Physiological Self-Regulation of Regional Brain Activity Using Real-Time Functional Magnetic Resonance Imaging (fMRI): Methodology and Exemplary Data’ (2003) 19 *Neuroimage* 577.

²¹⁸ Andrea Caria, Ranganatha Sitaram and Niels Birbaumer, ‘Real-Time fMRI: A Tool for Local Brain Regulation’ (2012) 18 *The Neuroscientist* 487, 487.

²¹⁹ David Eagleman, Mark Correro and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

²²⁰ Ibid.

²²¹ Andrea Caria, Ranganatha Sitaram and Niels Birbaumer, ‘Real-Time fMRI: A Tool for Local Brain Regulation’ (2012) 18 *The Neuroscientist* 487.

²²² David Eagleman, Mark Correro and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

²²³ Ibid.

IV FRONTAL LOBE FUNCTION

The frontal lobe is one of the major lobes of the cerebral cortex on each side of the brain. It is located at the front of each cerebral hemisphere and positioned in front of the parietal lobe, and superior and anterior to the temporal lobes. The frontal lobe contains most of the dopamine-sensitive neurons in the cerebral cortex. The dopamine system is associated with reward, attention, short-term memory tasks, planning and motivation. The executive functions of the frontal lobes involve the ability to recognize future consequences resulting from current actions, to choose between good and bad actions (or better and best), override and suppress socially unacceptable responses (impulse-control), and to determine similarities and differences between things or events. The frontal lobe is the same part of the brain that is responsible for other executive functions such as judgement, decision-making skills, attention span and inhibition.

A *Impulse-Control*

[T]he persistent lack of restraint and consideration of consequences.²²⁴

Poor impulse-control, or impulsivity, is a multifactorial construct²²⁵ that involves a tendency to act on a whim, exhibiting behaviour characterized by little or no forethought, reflection or consideration of the consequences.²²⁶ Impulsive actions are typically ‘poorly conceived, prematurely expressed, unduly risky, or inappropriate to the situation [and] often result in undesirable consequences’.²²⁷ Such actions imperil long-term goals and strategies for success,²²⁸ yet they often produce desirable short-term rewards. A

²²⁴ G T Harris, M E Rice and V L Quinsey, ‘Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument’ (1993) 20 *Criminal Justice and Behavior* 315.

²²⁵ J L Evenden, ‘Varieties of Impulsivity’ (1999) 146 *Psychopharmacology* 348.

²²⁶ G R VandenBos, *APA Dictionary of Psychology* (American Psychological Association, 1997).

²²⁷ J H Daruna and P A Barnes, ‘A Neurodevelopmental View of Impulsivity’ in William George McCown et al, *The Impulsive Client: Theory, Research, and Treatment* (American Psychological Association, 1993) 23.

²²⁸ Gregory J Madden and Patrick S Johnson, ‘A Delay-Discounting Primer’ in Gregory Jude Madden and Warren K Bickel, *Impulsivity: The Behavioral and Neurological Science of Discounting* (American Psychological Association, 2010) 11.

functional variety of impulsivity has also been suggested, which involves action with little forethought in appropriate situations resulting in desirable consequences. ‘When such actions have positive outcomes, they tend not to be seen as signs of impulsivity, but as indicators of boldness, quickness, spontaneity, courageousness, or unconventionality.’²²⁹ Thus, the construct of impulsivity includes at least the two independent components of acting without an appropriate amount of deliberation,²³⁰ which may or may not be functional, and, choosing short-term gains over long-term ones.²³¹

1 Neurobiology

Neurobiological findings suggest that there are specific brain regions involved in impulsive behaviour,²³² although different brain networks may contribute to different manifestations of impulsivity.²³³ Although the precise neural mechanisms underlying disorders of impulse-control are not fully known, the brain regions associated with impulse-control have been well characterized.²³⁴ The prefrontal cortex (PFC) — the thick outer layer (cerebral cortex) of the prefrontal lobe (the front portion of the frontal lobe) — is the brain region most ubiquitously implicated in impulsivity.²³⁵ Although outside of the frontal lobes, the anterior cingulate cortex (ACC) — ‘a limbic region associated with

²²⁹ J H Daruna and P A Barnes, ‘A Neurodevelopmental View of Impulsivity’ in William George McCown et al, *The Impulsive Client: Theory, Research, and Treatment* (American Psychological Association, 1993) 23; Scott J Dickman, ‘Functional and Dysfunctional Impulsivity: Personality and Cognitive Correlates’ (1990) 58 *Journal of Personality and Social Psychology* 95.

²³⁰ J H Daruna and P A Barnes, ‘A Neurodevelopmental View of Impulsivity’ in William George McCown et al, *The Impulsive Client: Theory, Research, and Treatment* (American Psychological Association, 1993) 23.

²³¹ Howard Rachlin, ‘Self-Control as an Abstraction of Environmental Feedback’ in *The Science of Self-Control* (Harvard University Press, 2010) 183.

²³² Raymond Joseph Corsini, *The Dictionary of Psychology* (Psychology Press, 1999) 476; H A Berlin, ‘Impulsivity, Time Perception, Emotion and Reinforcement Sensitivity in Patients with Orbitofrontal Cortex Lesions’ (2004) 127 *Brain* 1108; C H Salmond et al, ‘Deficits in Decision-Making in Head Injury Survivors’ (2005) 22 *Journal of Neurotrauma* 613.

²³³ Robert Whelan et al, ‘Adolescent Impulsivity Phenotypes Characterized by Distinct Brain Networks’ (2012) 15 *Nature Neuroscience* 920.

²³⁴ Eyal Aharoni et al, ‘Neuroprediction of Future Rearrest’ (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6223.

²³⁵ F Xavier Castellanos and Rosemary Tannock, ‘Neuroscience of Attention-Deficit/Hyperactivity Disorder: The Search for Endophenotypes’ (2002) 3 *Nature Reviews Neuroscience* 617.

error processing, conflict monitoring, response selection, and avoidance learning',²³⁶ and inhibiting undesirable behaviour²³⁷ — has also been associated with impulse-control.²³⁸ Recent research has uncovered additional regions of interest, as well as highlighted particular sub-regions of the PFC, that can be tied to performance in specific behavioural tasks.

Prevailing theory posits that two distinct and interconnected brain systems interact with each other and compete for behavioural outcomes.²³⁹ The impulsive system (involving the amygdala, located in the medial temporal lobe) provides an immediate signal of pain or pleasure; the reflective system involving the ventromedial prefrontal cortex (vmPFC) considers the long-term consequences of behavioural alternatives.²⁴⁰ Impulsivity has also been correlated with reduced volumes in the vmPFC.²⁴¹ Simply put, impulsivity results from an imbalance between these systems: the latter is unable to check the push for immediate action signalled by the former.²⁴²

²³⁶ Eyal Aharoni et al, 'Neuroprediction of Future Rearrest' (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6223; C B Holroyd and M G H Coles, 'The Neural Basis of Human Error Processing: Reinforcement Learning, Dopamine, and the Error-Related Negativity' (2002) 109 *Psychological Review* 679; K A Kiehl, P F Liddle and J B Hopfinger, 'Error Processing and the Rostral Anterior Cingulate: An Event-Related fMRI Study' (2000) 37 *Psychophysiology* 216; D S Kosson et al, 'The Role of the Amygdala and Rostral Anterior Cingulate in Encoding Expected Outcomes During Learning' (2006) 29 *Neuroimage* 1161; D H Mathalon, S L Whitfield and J M Ford, 'Anatomy of an Error: ERP and fMRI' (2003) 64 *Biological Psychology* 119; V van Veen and C S Carter, 'The Anterior Cingulate as a Conflict Monitor: fMRI and ERP Studies' (2002) 77 *Physiology and Behavior* 477.

²³⁷ Eyal Aharoni et al, 'Predictive Accuracy in the Neuroprediction of Rearrest' (2014) 9 *Social Neuroscience* 332, 332.

²³⁸ Eyal Aharoni et al, 'Neuroprediction of Future Rearrest' (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6223.

²³⁹ A Bechara, 'Decision Making, Impulse Control and Loss of Willpower To Resist Drugs: A Neurocognitive Perspective' (2005) 8 *Nature Neuroscience* 1458; A Bechara and M Van Der Linden, 'Decision-Making and Impulse Control After Frontal Lobe Injuries' (2005) 18 *Current Opinion in Neurology* 734.

²⁴⁰ A D Boes et al, 'Right Ventromedial Prefrontal Cortex: A Neuroanatomical Correlate of Impulse Control in Boys' (2009) 4(1) *Social Cognitive and Affective Neuroscience*, 1; M A Cato et al, 'Assessing The Elusive Cognitive Deficits Associated with Ventromedial Prefrontal Damage: A Case of a Modern-Day Phineas Gage' (2004) 10 *Journal of International Neuropsychological Society* 453.

²⁴¹ A D Boes et al, 'Right Ventromedial Prefrontal Cortex: A Neuroanatomical Correlate of Impulse Control in Boys' (2009) 4(1) *Social Cognitive and Affective Neuroscience*, 1.

²⁴² J Blair, D Mitchell and K Blair, *The Psychopath: Emotion and Brain* (Blackwell Press, 2005); L J Siever, 'Neurobiology of Aggression and Violence' (2008) 165 *American Journal of Psychiatry* 429.

2 *Neuroscientific Underpinning*

The neuroscientific underpinning of the frontal lobe rehabilitation treatment referenced in this thesis is based on the work of Assistant Professors Pearl Chiu and Stephen LaConte who found that ‘through neurofeedback, cognitive control may be enhanced and/or subjective craving may be diminished in chronic smokers’.²⁴³ The following studies and publications form the basis of this treatment:

- P Chiu et al, ‘Modulating “Crave” and “Don’t Crave” Brain States Using Real-time fMRI Neurofeedback’ (Abstract, 19th Annual Meeting of the Organization for Human Brain Mapping, Seattle, 20 June 2013);
- P Chiu et al, ‘Real-time fMRI Modulation of Craving and Control Brain States in Chronic Smokers’ (Abstract, 39th Annual Meeting of Society of Neuroscience, Chicago, 21 October 2009);
- S LaConte et al, ‘Modulating rt-fMRI Neurofeedback Interfaces via Craving and Control in Chronic Smokers’ (Abstract, 15th Annual Meeting of the Organization for Human Brain Mapping, San Francisco, 23 June 2009);
- S M LaConte, ‘Decoding fMRI Brain States in Real-Time’ (2010) *Neuroimage* doi: 10.1016/j.neuroimage.2010.06.052;
- Stephen M LaConte et al, ‘Real-Time fMRI Using Brain-State Classification’ (2007) 28 *Human Brain Mapping* 1033;
- Andrea Caria, Sitaram Ranganatha and Niels Birbaumer, ‘Real-Time fMRI: A Tool for Local Brain Regulation’ (2012) 18 *The Neuroscientist* 487; and
- S M LaConte, ‘Modulating rt-fMRI neurofeedback interfaces via craving and control in chronic smokers’ (2009) 47 *Neuroimage* S45.

In collaboration with LaConte, Eagleman from the laboratory at Baylor College of Medicine in Houston, Texas, has launched experiments using real-time feedback techniques in neuroimaging. These experiments are honing techniques to allow users to strengthen the influence of their prefrontal cortex, the part of the brain that specializes in

²⁴³ S M LaConte, ‘Modulating rt-fMRI Neurofeedback Interfaces via Craving and Control in Chronic Smokers’ (2009) 47 *Neuroimage* S45.

long-term decision-making and impulse-control. Such techniques can change the personality of an individual as little as possible, merely allowing the improvement of long-term consideration and control over impulsivity. This technique may aid in — but is not limited to — the rehabilitation of offenders who cannot resist impulsive behaviour.²⁴⁴

V FRONTAL LOBE REHABILITATION TREATMENT (FLRT)

I do not understand what I do. For what I want to do, I do not do, but what I hate, I do.²⁴⁵

The ‘Initiative on Neuroscience and the Law’²⁴⁶ is exploring techniques that will allow users to strengthen the influence of their prefrontal cortex, which, as earlier mentioned, is a part of the brain that specializes in long-term decision-making and impulse-control. Raw data from neuroimaging can be reconstructed in ‘real-time’ and visually displayed in a scanner, and the neural activity can be shown directly to an individual, who can then attempt to modify it. Director of the Initiative, David Eagleman, reasons that this ‘frontal lobe work-out’ designed to improve long-term consideration and control over impulsivity would enable offenders to receive ‘neurofeedback’²⁴⁷ treatments designed to retrain their brains towards pro-social behaviour. Placing ‘the individual in the driver’s seat of his own neural circuitry’,²⁴⁸ this technology has the capacity to customize the rehabilitation of offenders.

²⁴⁴ David Eagleman, Mark Correrio and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

²⁴⁵ Romans 7:15.

²⁴⁶ Headquartered at Baylor College of Medicine, Houston, Texas, United States of America.

²⁴⁷ Stephen M Laconte et al, ‘Real-Time fMRI Using Brain-State Classification’ (2007) 28 *Human Brain Mapping* 1033, 1034; R Christopher deCharms, ‘Reading and Controlling Human Brain Activation Using Real-Time Functional Magnetic Resonance Imaging’ (2007) 11 *Trends in Cognitive Science* 473, 474; Nikolaus Weiskopf et al, ‘Physiological Self-Regulation of Regional Brain Activity Using Real-Time Functional Magnetic Resonance Imaging (fMRI): Methodology and Exemplary Data’ (2003) 19 *Neuroimage* 577, 578.

²⁴⁸ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 250.

The ‘prefrontal work-out’,²⁴⁹ as coined by Eagleman, capitalises on the ‘inner parliament’²⁵⁰ of the brain whereby ‘the brain is a team of rivals, a competition among different neural populations’.²⁵¹ The different factions in the brain each compete to control the single output channel of individual behaviour. This is based on the notion that the frontal lobe circuits, which represent the long-term considerations, cannot override individual elections when temptation (say, to commit crime) is present. In German, if someone is trying to delay instant gratification, it is said that he or she has to overcome their *innerer Schweinehund*, or ‘inner pig-dog’. The prefrontal work-out utilizes real-time brain imaging to monitor which parts of a person’s brain are active, and how active they are, when resisting a particular stimulus, be it tobacco, an illicit substance or, by extension, a criminal activity. A simplistic example is that of resisting a piece of chocolate cake. In this instance, an individual would look at pictures of chocolate cake during brain scanning. The experiments determine the regions of the brain involved in the craving. The activity in those networks is represented by a vertical bar on a computer screen. The individual tries to make the bar go down. The bar acts as a gauge for the individual’s craving: if his or her craving networks are increasing, the bar is high; if he or she is suppressing the craving, the bar is low. The individual tries different mental avenues until the bar begins to sink. These can include ‘anything from simple finger tapping to mental imagery or complex cognitive tasks’.²⁵² When it goes down, it means the individual has successfully recruited frontal circuitry to suppress the networks involved in impulsive craving — that is, the long term has won over the short term. Still looking at pictures of chocolate cake, the individual would practice making the bar go down over and over until he or she has strengthened those frontal circuits. By this method of visualization of task-related brain activity, the individual is able to visualize the activity in the parts of the brain that need modulation, and witness the effects of different mental approaches.²⁵³

²⁴⁹ Ibid 182.

²⁵⁰ T J Dawe, ‘Are You Controlled By Your Inner Pigdog? — The Neurobiology of Choice’ *Beams and Struts* (online), 13 March 2012 <<http://www.beamsandstruts.com/articles/item/842-pigdog>>.

²⁵¹ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 182.

²⁵² J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386, 388.

²⁵³ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 183.

After training at the prefrontal ‘gym’, an individual might still crave chocolate cake, but he or she will have experience in utilizing the associated brain pathways to control, rather than succumb to, the craving.²⁵⁴ Strengthening the ‘neural populations that care about long-term consequences’ inhibits impulsivity and encourages reflection.²⁵⁵ It represents ‘new strategies for rehabilitation to allow an individual to have better control of his behavior, even in the absence of external authority’.²⁵⁶ Arguably the most striking application of neurofeedback is the possibility to take possession of ‘volitional control of localized brain activity using real-time fMRI ... protocols’.²⁵⁷ Without the use of drugs or surgery, this approach ensures that the brain remains intact and ‘leverages the natural mechanisms of brain plasticity to help the brain help itself’.²⁵⁸ In other words, if a person considers committing a criminal act, that is permissible, as long as he or she does not choose to take action:

We cannot restrict what people think; nor should a legal system hope to set that as its goal. Social policy can only hope to prevent impulsive thoughts from tipping into behavior.²⁵⁹

Although there are no verifiable peer-reviewed results that validate this *exact* treatment of resisting the impulse to engage in criminal behaviour, a longitudinal, prospective study of the prediction of future antisocial behaviour (namely, re-arrest) in released criminal offenders²⁶⁰ revealed that functional changes in the ACC within a sample of 96 criminal offenders engaged in the Go/No-Go (GNG) impulse-control task significantly predicted their re-arrest following release from prison.²⁶¹ (After being released they were tracked from 2007 to 2010²⁶².)

²⁵⁴ Ibid 184.

²⁵⁵ Ibid.

²⁵⁶ David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 165.

²⁵⁷ Andrea Caria, Ranganatha Sitaram and Niels Birbaumer, ‘Real-Time fMRI: A Tool for Local Brain Regulation’ (2012) 18 *The Neuroscientist* 487, 487.

²⁵⁸ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 184.

²⁵⁹ Ibid 184.

²⁶⁰ Eyal Aharoni et al, ‘Neuroprediction of Future Rearrest’ (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6223.

²⁶¹ Eyal Aharoni et al, ‘Predictive Accuracy in the Neuroprediction of Rearrest’ (2014) 9 *Social Neuroscience* 332, 332.

²⁶² Ibid 333.

Participants completed a number of psychological and behavioural assessment measures and an fMRI-based inhibition task using the Mind Research Network's Mobile MRI system before release from one of two New Mexico state correctional facilities.²⁶³ Behavioural impulsivity was measured during fMRI using the GNG task, a widely used procedure that requires participants to inhibit a prepotent²⁶⁴ motor response. The task, modeled after the work of Kiehl et al,²⁶⁵ presents participants with a frequently occurring target (the letter 'X') interleaved with a less-frequent distracter (the letter 'K') on a computer screen. Participants were instructed to depress a button with their right index finger as quickly and accurately as possible whenever they saw the target ('go' stimulus) and not when they saw the distracter ('no-go' stimulus). As targets are more frequent than distracters in this task, a prepotent response toward the targets is elicited. When a distracter is presented, participants are required to inhibit²⁶⁶ their button response.²⁶⁷ Those with lower ACC activity during the tasks were more likely to be re-arrested.

The conflation of these findings, and the impulse-control experiments of Assistant Professors Chiu and LeConte, could result in a treatment to assist offenders to strengthen pathways concerned with longer-term consequences, thereby reducing the likelihood of reoffending.

²⁶³ Eyal Aharoni et al, 'Neuroprediction of Future Rearrest' (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6225.

²⁶⁴ 'A prepotent response is a response for which immediate reinforcement (positive or negative) is available or has been previously associated with that response' in Russell A Barkley and Kevin R Murphy, *Attention-Deficit Hyperactivity Disorder: A Clinical Workbook, Volume 2* (Guilford Press, 2006) 301. Adele Diamond, 'Executive Functions' (2013) 64 *Annual Review of Psychology* 135, 138, explains that the executive functions are often invoked when it is necessary to override these prepotent responses that might otherwise be automatically elicited by stimuli in the external environment. For example, on being presented with a potentially rewarding stimulus, such as a piece of chocolate cake, a person might have the automatic response to take a bite. However, where such behaviour conflicts with internal plans (such as having decided not to eat chocolate cake while on a diet), the executive functions might be engaged to inhibit that response.

²⁶⁵ K A Kiehl, P F Liddle and J B Hopfinger, 'Error Processing and the Rostral Anterior Cingulate: An Event-Related fMRI Study' (2000) 37 *Psychophysiology* 216.

²⁶⁶ Gordon D Logan, Russell J Schachar and Rosemary Tannock, 'Impulsivity and Inhibitory Control' (1997) 8(1) *Psychological Science* 60: 'Inhibitory control, often conceptualized as an executive function, is the ability to inhibit or hold back a prepotent response. It is theorized that impulsive behaviour reflects a deficit in this ability to inhibit a response.'

²⁶⁷ Eyal Aharoni et al, 'Neuroprediction of Future Rearrest' (2013) 110 *Proceedings of the National Academy of Sciences of The United States Of America* 6223, 6225.

VI IMPULSE-CONTROL DEFINED

A *Diagnostic*

Poor impulse-control is not a mental disorder. Often the following terms are used interchangeably: impulse-control, impulsivity, impulsiveness. Impulse-control is the degree to which a person can control the desire for immediate gratification. Everyone has issues with impulse-control to varying degrees: it is simply part of human nature.

Impulsivity is both a facet of personality as well as a major component of various disorders, including, inter alia, Attention-Deficit/Hyperactivity Disorder,²⁶⁸ Substance-Related Disorders,²⁶⁹ Bipolar Disorder,²⁷⁰ Antisocial Personality Disorder,²⁷¹ and Borderline Personality Disorder.²⁷² Impulsiveness may also be a factor in procrastination.²⁷³ Abnormal patterns of impulsivity have also been noted in instances of Acquired Brain Injury²⁷⁴ and Neurodegenerative Diseases.²⁷⁵

1 *Key Terms Defined*

(a) *Mental Health*

The World Health Organization defines mental health as: ‘a state of well-being in which the individual realises his or her own abilities, can cope with the normal stresses of life,

²⁶⁸ Joel T Nigg, ‘Is ADHD a Disinhibitory Disorder?’ (2001) 127 *Psychological Bulletin* 571.

²⁶⁹ Scott D Lane et al, ‘Relationships Among Laboratory and Psychometric Measures of Impulsivity: Implications in Substance Abuse and Dependence’ (2003) 2(2) *Addictive Disorders & Their Treatment* 33; G J Madden et al, ‘Impulsive and Self-Control Choices in Opioid-Dependent Patients and Non-Drug-Using Control Patients: Drug and Monetary Rewards’ (1997) 5 *Experimental and Clinical Psychopharmacology* 256.

²⁷⁰ Chantal Henry et al, (2001) ‘Affective Instability and Impulsivity in Borderline Personality and Bipolar II Disorders: Similarities and Differences’ (2001) 35 *Journal of Psychiatric Research* 307.

²⁷¹ N R Horn et al, ‘Response Inhibition and Impulsivity: An fMRI Study’ (2003) 41 *Neuropsychologia* 1959.

²⁷² Chantal Henry et al, (2001) ‘Affective Instability and Impulsivity in Borderline Personality and Bipolar II Disorders: Similarities and Differences’ (2001) 35 *Journal of Psychiatric Research* 307.

²⁷³ Piers Steel, *The Procrastination Equation: How to Stop Putting Things Off and Start Getting Stuff Done* (HarperCollins, 2010).

²⁷⁴ Mark R Dixon et al, ‘Impulsivity, Self-Control, and Delay Discounting in Persons with Acquired Brain Injury’ (2005) 20 *Behavioral Interventions* 101.

²⁷⁵ Ezequiel Gleichgerricht et al, ‘Decision-Making Cognition in Neurodegenerative Diseases’ (2010) 6 *Nature Reviews Neurology* 611.

can work productively and fruitfully, and is able to make a contribution to his or her community’.²⁷⁶

(b) Mental Illness

Diagnoses of mental illnesses world-wide conform to classifications listed in two professional publications: the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5),²⁷⁷ and the *International Classification of Diseases, Tenth Revision* (ICD-10).²⁷⁸ The DSM-5 covers mental illnesses and the ICD-10, the official coding system in the United States of America²⁷⁹ (and used in Australia) covers mental and physical illnesses. The DSM-5 is a ‘standard reference for clinical practice in the mental health field’²⁸⁰ and is the leading diagnostic manual in Australia.

The terms ‘mental illness’ and ‘mental disorder’ are used interchangeably within legal literature. It is also ‘well established both in case law and the mental health literature that clinical and legal meanings of mental illness are not synonymous’.²⁸¹ Unless otherwise stated, reference to ‘mental illness’ and ‘mental impairment’ includes mental disorders, and ‘mentally ill/impaired offenders’ include those suffering from a mental disorder as stipulated within the DSM-5.

(c) Mental Disorder

The definition of mental disorder in the DSM-5 ‘was developed to meet the needs of clinicians, public health professionals, and research investigators. ... By providing a

²⁷⁶ World Health Organization, *Mental Health: A State of Well-Being* (2015) <<http://www.who.int/mediacentre/factsheet/fs220/en/.htm>>.

²⁷⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013).

²⁷⁸ World Health Organization, *International Classification of Diseases, Tenth Revision (ICD-10)* (World Health Organization).

²⁷⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) xli.

²⁸⁰ Ibid.

²⁸¹ Cynthia Calkins Mercado, Robert F Schopp and Brian H Bornstein, ‘Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment?’ (2005) 10 *Aggression and Violent Behavior* 289, 295.

compendium based on a review of the pertinent clinical and research literature, DSM-5 may facilitate legal decision makers' understanding of the relevant characteristics of mental disorders'.²⁸² A mental disorder is defined as:

a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.²⁸³

An official nomenclature with applicability in 'a wide diversity of contexts',²⁸⁴ the DSM-5 describes the following disorders:

- Neurodevelopmental Disorders;
- Schizophrenia Spectrum and Other Psychotic Disorders;
- Bipolar and Related Disorders;
- Depressive Disorders;
- Anxiety Disorders;
- Obsessive-Compulsive and Related Disorders;
- Trauma- and Stressor-Related Disorders;
- Dissociative Disorders;
- Somatic Symptom and Related Disorders;
- Feeding and Eating Disorders;
- Elimination Disorders;
- Sleep-Wake Disorders;
- Sexual Dysfunctions;
- Gender Dysphoria;
- Disruptive, Impulse-Control, and Conduct Disorders;
- Substance-Related and Addictive Disorders;

²⁸² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 25.

²⁸³ Ibid 20.

²⁸⁴ Ibid xli.

- Neurocognitive Disorders;
- Personality Disorders;
- Paraphilic Disorders; and
- Other Mental Disorders.

VII IMPULSE-CONTROL CATEGORIZED

For ease in exposition, as a concept involved in mental health classifications, impulse-control is divided into four separate categories:

Category One (hereinafter ‘C1’) recognizes that impulse-control is a *facet of personality*. Impulsivity is part of executive functioning and everyone’s executive functioning operates on a continuum.

Accordingly, ‘pure’ poor impulse-control does not amount to a mental disorder, and, as such, C1 offenders would not be eligible for participation in a MHDCt. FLRT could be administered to C1 offenders through the regular criminal justice system.

In Category Two (hereinafter ‘C2’), an extreme lack of impulse-control is a mental disorder and is diagnosed as *Impulse-Control Disorder*. Consequently, FLRT could be administered to C2 offenders through MHDCts.

Impulse-control, in Category Three (hereinafter ‘C3’), is *part of the diagnostic criteria for various disorders*. This category recognizes impulse-control as a diagnostic criterion for a mental disorder, thus, FLRT could be administered to C3 offenders through MHDCts.

Category Four (hereinafter ‘C4’) considers that impulse-control may not be part of the defining criteria of the diagnosed disorder, but may be an *additional significant problem* for someone with a mental disorder. Impulse-control as an additional issue to a diagnosed mental disorder could enable FLRT to be administered to C4 offenders through MHDCts.

It is important to bear in mind that all categories of offenders — with a mental disorder (C2, C3, C4) or without a mental disorder (C1) — are deemed criminally responsible, do not lack volitional capacity and appreciate the criminality of their conduct. Offenders may suffer from a degree of ‘impairment’ but not to the extent that they could be wholly exculpated. Consequently, matters surrounding volitional capacity in the domain of insanity and the criminal responsibility standard in the *M’Naghten* rules²⁸⁵ are not examined at this point. Expansion of the utility of FLRT to these possibilities is discussed in Chapter 5.

A Facet of Personality (C1)

Impulsivity is defined in the Glossary of Technical Terms of the DSM-5 as ‘[a]cting on the spur of the moment in response to immediate stimuli; acting on a momentary basis without a plan or consideration of outcomes; difficulty establishing and following plans; a sense of urgency and self-harming behavior under emotional distress. Impulsivity is a facet of the broad personality trait domain disinhibition.’²⁸⁶

Disinhibition is defined by an ‘[o]rientation toward immediate gratification, leading to impulsive behavior driven by current thoughts, feelings, and external stimuli, without regard for past learning or consideration of future consequences’.²⁸⁷

²⁸⁵ A set of rules describing the defence of insanity in common law jurisdictions, deriving from *M’Naghten’s case* (1843) 10 Cl & F 200, 8 ER 718. The rules provide the requirement for the common law defence of insanity that at the time of committing the act the accused was labouring under such a defect of reason, owing to disease of the mind, as not to know the nature and quality his or her act, or, if the accused did know it, he or she did not know that what he or she was doing was wrong.

²⁸⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 823.

²⁸⁷ Ibid 820.

Impulse is to be distinguished from ‘compulsion’. Compulsions ‘are repetitive behaviours or mental acts that an individual feels driven to perform in response to an obsession according to rules that must be applied rigidly’.²⁸⁸

Impulsivity is something everyone suffers from. ‘Many of the symptoms that define the disruptive, impulse-control, and conduct disorders are behaviors that can occur to some degree in typically developing individuals. Thus, it is critical that the frequency, persistence, pervasiveness across situations, and impairment associated with the behaviors indicative of the diagnosis be considered relative to what is normative for a person’s age, gender, and culture when determining if they are symptomatic of a disorder’.²⁸⁹

Offenders in this category have some problems with impulse-control, but do not have a mental illness. They would be ineligible for diversion in the sense that they could not be diverted fully into treatment. They would be eligible for FLRT as part of a good behaviour bond or some other such court-mandated treatment. Only having a mental illness would enable them to be fully diverted. (Arguably, everyone could benefit from FLRT then.)

1 *Discretionary NeuroDiversion Test*

Certainly, a neurological insult or cognitive damage *not* amounting to a mental disorder would be an example of a C1 offender. Where there is not a biological or organismic variable to a measureable extent, determining whether an offender is suffering from ‘pure’ poor impulse-control — that is, not a mental disorder, simply struggling with impulsivity — the magistracy/judiciary could be assisted by clinicians when making this determination.

²⁸⁸ Ibid 235.

²⁸⁹ Ibid 462.

A subjective offender report, with the potential to be minimized or exaggerated to satisfy a legal threshold, is not a reliable or valid way to measure control problems.²⁹⁰ Factors arguably relevant to determining the appropriateness of FLRT for C1 offenders could be guided by those proffered by Rogers and Shuman.²⁹¹ These factors include the defendant's perceived options, decision-making abilities, the deliberateness of the actions, and the point at which criminal actions become 'inevitable'.²⁹² This approach could be adopted in conjunction with Webster and Jackson²⁹³ who provide a clinical perspective of 'impulse-driven conduct', with the following characteristics enveloped in five domains: (1) interpersonal dysfunction: manipulative, black/white thinking with regard to others, distrustful; (2) lack of plans: avoidance of change, volatile lifestyle; (3) distorted self-esteem: low self-awareness, hopelessness, acting rashly to avoid emotional discomfort; (4) anger and rage: aggression, low frustration tolerance, high explosivity; and (5) irresponsibility: entitlement, beliefs that most others act immorally and irresponsibly, poor ability to cope with emotional discomfort.

In the application of this 'test' to determine the utility of FLRT for a non-mentally ill C1 offender, 'clinicians can offer descriptive and explanatory testimony relevant to an offender's impairment, and the relationship between that impairment and the criminal conduct at issue'.²⁹⁴ There is 'utility to clinical expertise when it provides thorough description of clinicians' unique understanding of human behaviour',²⁹⁵ which in turn assists the court in its normative judgement.

²⁹⁰ S J Morse, 'Fear of Danger, Flight from Culpability' (1998) 142 *Psychology, Public Policy, and Law* 250, 263.

²⁹¹ R Rogers and D W Shuman, *Conducting Insanity Evaluations* (Guilford Press, 2nd ed, 2000) 80.

²⁹² Ibid.

²⁹³ C D Webster and M A Jackson, 'A Clinical Perspective on Impulsivity' in C D Webster and M A Jackson (eds), *Impulsivity: Theory, Assessment, and Treatment* (Guilford Press, 1997) 16.

²⁹⁴ R F Schopp and B J Sturgis, 'Sexual Predators and Legal Mental Illness for Civil Commitment' (1995) 13 *Behavioral Sciences and the Law* 437.

²⁹⁵ Cynthia Calkins Mercado, Robert F Schopp and Brian H Bornstein, 'Evaluating Sex offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment?' (2005) 10 *Aggression and Violent Behavior* 289, 296.

1 *Disruptive, Impulse-Control and Conduct Disorders*

Disruptive, impulse-control, and conduct disorders include conditions involving problems in the self-control of emotions and behaviours. While other disorders in the DSM-5 may also involve problems in emotional and/or behavioural regulation, the disorders in this chapter are unique in that they are manifested in behaviours that violate the rights of others (for example, aggression, destruction of property) and/or bring the individual into significant conflict with societal norms or authority figures.²⁹⁶

Offenders in this category may be diagnosed with Oppositional Defiant Disorder. Criterion A of the diagnostic criteria refers to ‘[a] pattern of angry/irritable mood, argumentative/defiant behavior, or vindictiveness’.²⁹⁷

Similarly, criterion A of the diagnostic criteria for Intermittent Explosive Disorder, another plausible diagnosis for offenders in C2, records ‘[r]ecurrent behavioral outbursts representing a failure to control aggressive impulses’.²⁹⁸ Criterion C elaborates that ‘[t]he recurrent aggressive outbursts are not premeditated (i.e., they are impulsive and/or anger-based) are not committed to achieve some tangible objective (e.g., money, power, intimidation)’.²⁹⁹ A further diagnostic feature is that ‘[t]he impulsive (or anger-based) aggressive outbursts in intermittent explosive disorder have a rapid onset and, typically, little or no prodromal period’.³⁰⁰ Functional consequences assert that ‘legal (e.g., civil suits as a result of aggressive behaviour against person or property; criminal charges for assault) problems often develop as a result of intermittent explosive disorder’.³⁰¹

²⁹⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 461.

²⁹⁷ Ibid 462.

²⁹⁸ Ibid 466.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid 468.

Another relevant diagnosis in this category would be Conduct Disorder. ‘Personality features of trait negative emotionality and poor self-control ... frequently co-occur with conduct disorder.’³⁰² In terms of functional consequences, ‘[i]t is not uncommon for individuals with conduct disorder to come into contact with the criminal justice system for engaging in illegal behavior’.³⁰³

Other C2 diagnoses include Antisocial Personality Disorder and Pyromania, which encompasses ‘[i]ndividuals who impulsively set fires’.³⁰⁴ Criterion B of the diagnostic criteria for Pyromania refers to ‘[t]ension or affective arousal before the act’.³⁰⁵

Kleptomania — the ‘[r]ecurrent failure to resist impulses to steal objects that are not needed for personal use or for their monetary value’³⁰⁶ — is another impulse-control disorder that may be typical of C2 offenders. ‘Individuals with kleptomania typically attempt to resist the impulse to steal, and they are aware that the act is wrong and senseless.’³⁰⁷

Thus, for C2 offenders diagnosed with Disruptive, Impulse-Control and Conduct Disorders, such as Oppositional Defiant Disorder, Intermittent Explosive Disorder, Conduct Disorder, Antisocial Personality Disorder, Pyromania and Kleptomania, FLRT could be administered through MHDCts.

³⁰² Ibid 473.

³⁰³ Ibid 474.

³⁰⁴ Ibid 477.

³⁰⁵ Ibid 476.

³⁰⁶ Ibid 478.

³⁰⁷ Ibid.

C *Impulse-Control as Part of Diagnostic Criteria for a Disorder (C3)*

Impulse-control may be part of the diagnostic criteria for various disorders.

1 *Neurodevelopmental Disorders*

Criterion A of the diagnostic criteria for Intellectual Disability (Intellectual Development Disorder) refers to ‘[d]eficits in intellectual functions, such as reasoning, problem solving, planning, [and] judgment’.³⁰⁸ Impulse-control is implicated within these functions.

Impulse-control is a diagnostic feature of Attention-Deficit/Hyperactivity Disorder (ADHD), whereby ‘[i]mpulsivity refers to hasty actions that occur in the moment without forethought and that have high potential for harm to the individual Impulsivity may reflect a desire for immediate rewards or an inability to delay gratification. Impulsive behaviours may manifest as social intrusiveness and/or as making important decisions without consideration of long-term consequences’.³⁰⁹ A functional consequence of this impulsivity is that ‘[c]hildren with ADHD are significantly more likely than their peers without ADHD to develop conduct disorder in adolescence and antisocial personality disorder in adulthood, consequently increasing the likelihood for substance use disorders and incarceration’.³¹⁰

2 *Bipolar and Related Disorders*

(a) *Bipolar I Disorder*

Criterion B7 of the diagnostic criteria for Manic Episode and Hypomanic Episode implicates poor impulse-control as ‘excessive involvement in activities that have a high

³⁰⁸ Ibid 33.

³⁰⁹ Ibid 61.

³¹⁰ Ibid 63.

potential for painful consequences’.³¹¹ An associated feature includes ‘catastrophic consequences of a manic episode (e.g., ... difficulties with the law ...) often result from poor judgment, loss of insight, and hyperactivity’.³¹²

(b) Bipolar II Disorder

‘A common feature of bipolar II disorder is impulsivity’³¹³ and criterion B7 of the diagnostic criteria for Hypomanic Episode also highlights ‘[e]xcessive involvement in activities that have a high potential for painful consequences’.³¹⁴ Relevantly, an associated feature cautions that ‘[i]mpulsivity may also stem from a concurrent personality disorder, substance use disorder, anxiety disorder, another mental disorder, or a medical condition’.³¹⁵

3 Trauma- and Stressor-Related Disorders

(a) Posttraumatic Stress Disorder

Poor impulse-control manifests itself in criterion E1 of the Diagnostic Criteria: ‘Irritable behavior and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression toward people or objects.’³¹⁶ This is further complemented by criterion E2, which describes ‘[r]eckless or self-destructive behavior’.³¹⁷

(b) Acute Stress Disorder

Criterion B11 — ‘[i]rritable behavior and angry outbursts (with little or no provocation), typically expressed as verbal or physical aggression toward people or objects’³¹⁸ — is yet another expression of poor impulse-control. This is substantiated by the associated

³¹¹ Ibid 124.

³¹² Ibid 129.

³¹³ Ibid 136.

³¹⁴ Ibid 132.

³¹⁵ Ibid 136.

³¹⁶ Ibid 272.

³¹⁷ Ibid.

³¹⁸ Ibid 281.

feature that states that ‘individuals with acute stress disorder may display chaotic or impulsive behavior’.³¹⁹

4 *Personality Disorders*

Poor impulse-control is ubiquitously implicated in the diagnostic criteria for personality disorders — especially the majority listed in Cluster B.³²⁰ Personality disorders are grouped into three clusters based on descriptive similarities.³²¹ Cluster A includes paranoid, schizoid, and schizotypal personality disorders. Cluster B includes antisocial, borderline, histrionic, and narcissistic personality disorders. Cluster C includes avoidant, dependent, and obsessive-compulsive personality disorders.

(a) General Personality Disorder

Criterion A4 asserts that ‘[t]he essential feature of a personality disorder is an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual’s culture and is manifested in at least two of the following areas: cognition, affectivity, interpersonal functioning, or impulse-control’.³²²

(b) Antisocial Personality Disorder

Criterion A3 of the Diagnostic criteria explicitly states that this disorder is characterized by ‘[i]mpulsivity or failure to plan ahead’.³²³ A further diagnostic feature goes on to confirm that ‘[i]ndividuals with antisocial personality disorder fail to conform to social norms with respect to lawful behaviour ... A pattern of impulsivity may be manifested by a failure to plan ahead.’³²⁴

³¹⁹ Ibid 283.

³²⁰ Ibid xxxii.

³²¹ Ibid 646.

³²² Ibid 647.

³²³ Ibid 659.

³²⁴ Ibid 660.

(c) Borderline Personality Disorder

‘[M]arked impulsivity’³²⁵ is plainly part of the Diagnostic Criteria for Borderline Personality Disorder, whereby criterion A4 elaborates upon ‘[i]mpulsivity in at least two areas that are potentially self-damaging’.³²⁶

(d) Histrionic Personality Disorder

‘Individuals with antisocial personality disorder and histrionic personality disorder share a tendency to be impulsive.’³²⁷

(e) Personality Change Due to Another Medical Condition

Relevantly, ‘[c]ommon manifestations of the personality change include ... poor impulse-control’.³²⁸ ‘The clinical presentation in a given individual may depend on the nature and localization of the pathological process. For example, injury to the frontal lobes may yield symptoms such as lack of judgment or foresight, facetiousness, disinhibition, and euphoria.’³²⁹

In summary, for C3 offenders diagnosed with a disorder in which impulse-control is part of the diagnostic criteria, FLRT could be administered through MHDCts. In this category, such disorders may include Neurodevelopmental Disorders, such as Intellectual Disability (Intellectual Development Disorder). However, the degree of impairment may be relevant to the utility of the treatment. Attention-Deficit/Hyperactivity Disorder and Bipolar and Related Disorders such as Bipolar I Disorder and Bipolar II Disorder are also diagnoses relevant to this category. Trauma- and Stressor-Related Disorders, including Posttraumatic Stress Disorder and Acute Stress Disorder also fit within C3. Personality Disorders — General Personality Disorder, Antisocial Personality Disorder, Borderline

³²⁵ Ibid 663.

³²⁶ Ibid.

³²⁷ Ibid 669.

³²⁸ Ibid 683.

³²⁹ Ibid.

Personality Disorder and Histrionic Personality Disorder — are further examples of diagnoses within this category.

D *Impulse-Control as an Additional Significant Problem (C4)*

Impulse-control may not be part of the defining criteria of the presenting/diagnosed disorder, but may be an additional significant problem for someone with a mental illness. Indeed, ‘mental disorders do not always fit completely within the boundaries of a single disorder’.³³⁰

1 *Depressive Disorders*

(a) Unspecified Depressive Disorder

Specifier A6 in the diagnosis of Unspecified Depressive Disorder refers to ‘[i]ncreased or excessive involvement in activities that have a high potential for painful consequences’.³³¹

2 *Substance-Related and Addictive Disorders*

Poor impulse-control is significantly implicated in Substance-Related and Addictive Disorders as deficits in executive function³³² are typical with these disorders.

Although not explicitly contained within the diagnostic criteria for some mental disorders, impulse-control difficulties could be an additional problem to any number of mental disorders. Such disorders may include: Neurodevelopmental Disorders, Anxiety Disorders, Obsessive-Compulsive and Related Disorders, Dissociative Disorders, Somatic Symptom and Related Disorders, Feeding and Eating Disorders, Elimination

³³⁰ Ibid xli.

³³¹ Ibid 185.

³³² Ibid 612.

Disorders, Sleep-Wake Disorders, Sexual Dysfunctions, Gender Dysphoria, Paraphilic Disorders and Other Mental Disorders.

E *Incommensurability of FLRT with Certain Mental Disorders*

1 *Schizophrenia Spectrum and Other Psychotic Disorders*

Schizophrenia and Delusional Disorder are disorders for which FLRT would have little to no utility. ‘The characteristic symptoms of schizophrenia involve a range of cognitive, behavioural, and emotional dysfunctions.’³³³ Similarly, although an individual diagnosed with Delusional Disorder may experience ‘legal difficulties’,³³⁴ the disorganized thinking³³⁵ associated with schizophrenia spectrum and other psychotic disorders does not lend itself to FLRT. Psychotic illnesses affect the brain and result in changes to one’s thinking, emotions and behaviour. Someone experiencing an acute stage of a psychotic illness may lose touch with reality as their ability to make sense of thoughts, feelings and external information is seriously affected.³³⁶ Thus, the ability to process FLRT may be lacking entirely.

2 *Neurocognitive Disorders*

For those suffering from Neurocognitive Disorders, deficits in executive function and ability³³⁷ ‘such as poor performance on tests of mental flexibility, abstract reasoning, and response inhibition, are present’.³³⁸ For example, ‘[p]rogressive cognitive impairment is a core feature of Huntington’s disease, with early changes in executive function (i.e.,

³³³ Ibid 100.

³³⁴ Ibid 92.

³³⁵ Ibid 87.

³³⁶ Department of Health and Human Services, *About Mental Illness* (2015)

<www.dhhs.tas.gov.au/health_and_wellbeing/mental_health/related_topics/about_mental_illness>.

³³⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 625.

³³⁸ Ibid 615.

processing speed, organization, and planning’.³³⁹ Furthermore, Major or Mild Neurocognitive Disorder Due to Alzheimer’s Disease evidences a ‘gradual decline in cognition’³⁴⁰ and is ‘sometimes accompanied by deficits in executive function’.³⁴¹ Behavioural disinhibition is part of the diagnostic criteria for Major or Mild Frontotemporal Neurocognitive Disorder.³⁴² One of the associated features supporting a diagnosis of Major or Mild Neurocognitive Disorder Due to Traumatic Brain Injury refers to personality changes, in particular, disinhibition — of which impulsivity is a facet.³⁴³ FLRT would likely not be of therapeutic utility for an offender diagnosed with a Neurocognitive Disorder, as the requisite abstract reasoning skills may not be present. Furthermore, if the frontal lobes themselves are organically damaged, insufficient neural pathways may exist and thus the treatment would not be effective. Similarly, FLRT is not suitable for an offender with irremediable cognitive impairment or mental disability.

3 Psychopathy

The matter of psychopathy will relevantly be raised (if only to be excluded). Assessments of psychopathic characteristics are widely used in criminal justice settings,³⁴⁴ and as such, attract public attention and speculation. Psychopathy — also known as, though sometimes distinguished from, — the non-clinical term, ‘sociopathy’, is traditionally characterized by diminished empathy and remorse, and disinhibited or bold behaviour with consequent antisocial behavioral traits.³⁴⁵

Characteristically, psychopaths lack moral understanding: they are deficient in both their capacity to feel moral emotions, such as empathy and guilt, and the ability to distinguish moral right from wrong. Paradoxically, psychopaths who commit crimes are typically in

³³⁹ Ibid 639.

³⁴⁰ Ibid 611.

³⁴¹ Ibid 612.

³⁴² Ibid 614.

³⁴³ Ibid 625.

³⁴⁴ Robert D Hare, *The Psychopathy Checklist — Revised* (Multi-Health Systems, 1991).

³⁴⁵ Nic Damnjanovic, ‘Criminal Responsibility and Psychopathy in Western Australia’ (2011) 35 *University of Western Australia Law Review* 265, 266.

control of their actions and aware of their illegality and the relevant criminal sanctions.³⁴⁶ While impulsive behaviour is a feature in the construct of psychopathy, it has been proven in GNG tasks³⁴⁷ that such individuals can exert control over their impulses — it is more an issue of whether they choose to exercise that control or not, rather than a blanket inability.³⁴⁸ Psychopaths may react impulsively to certain situations, yet ‘they are in complete control while doing so’.³⁴⁹ Psychopaths know their actions are wrong, but may not care.³⁵⁰

Given that psychopathy is not a mental disorder listed within the DSM-5 and no psychiatric or psychological organization has sanctioned a diagnosis titled ‘psychopathy’,³⁵¹ the utility of FLRT in the rehabilitation of a psychopathic offender is not examined in this thesis.

VIII MENTAL ILLNESS AND OFFENDING

There is evidence that a person with a mental health or cognitive impairment has an increased risk of coming into contact with the criminal justice system. This is the implication of the evidence of overrepresentation.³⁵²

In Australia, and other countries, individuals with a mental illness comprise a disproportionate number of those who are arrested, appear before the courts, and are

³⁴⁶ Ibid.

³⁴⁷ Joseph P Newman and David S Kosson, ‘Passive Avoidance Learning in Psychopathic and Nonpsychopathic Offenders’ (1986) 95 *Journal of Abnormal Psychology* 252.

³⁴⁸ D T Lykken, ‘A Study of Anxiety in the Sociopathic Personality’ (1957) 55 *Journal of Abnormal and Social Psychology* 6; F J Schmauk, ‘Punishment, Arousal, and Avoidance Learning in Sociopaths’ (1970) 76 *Journal of Abnormal Psychology* 325; R D Hare, *Without Conscience: The Disturbing World of the Psychopaths Among Us* (Guilford Press, 1993).

³⁴⁹ R D Hare, *Without Conscience: The Disturbing World of the Psychopaths Among Us* (Guilford Press, 1993).

³⁵⁰ M Cima, F Tonnaer and M Hauser, ‘Psychopaths Know Right from Wrong But Don’t Care’ (2010) 5 *Social Cognitive and Affective Neuroscience* 59.

³⁵¹ Robert D Hare, *The Psychopathy Checklist — Revised* (Multi-Health Systems, 1991).

³⁵² New South Wales Law Reform Commission, ‘People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion’ (Report 135, New South Wales Law Reform Commission Report, June 2012) 12.

imprisoned.³⁵³ Prison health surveys in the States of New South Wales, Victoria and Western Australia have suggested that inmates have a much higher level of mental health problems than for members of the general population.³⁵⁴ One study indicated that the overall incidence of any psychiatric illness was 80 per cent for prisoners as compared to 31 per cent for the community.³⁵⁵ The high imprisonment rate of individuals with mental illnesses is a problem that does not seem to be abating,³⁵⁶ and various jurisdictions around the world have responded with measures aimed at diverting individuals with mental illnesses away from the criminal justice system. The United Kingdom has primarily used court-based mental health diversion services to divert offenders into mental health treatment.³⁵⁷ The Australian Senate Select Committee on Mental Health recommended that ‘there be a significant expansion of mental health courts and diversion programs, focused on keeping people with mental illness out of prison’.³⁵⁸ People with cognitive and mental health impairments may, for various reasons, offend repeatedly and become entrenched in the criminal justice system.³⁵⁹

Depression and anxiety are the largest mental health issues in Australia, with an estimated one million Australians living with depression each year.³⁶⁰ Schizophrenia and bi-polar disorder affect approximately one percent and two per cent of the population,

³⁵³ C Wallace et al, ‘Serious Criminal Offending and Mental Disorder: Case Linkage Study’ (1998) 172 *British Journal of Psychiatry* 477; J Ogloff, ‘Identifying the Needs of Mentally Ill People in Gaols and Prisons’ (2002) 9(1) *Psychiatry* 1; Tony Butler and Stephen Allnutt, ‘Mental Illness Among New South Wales’ Prisoners’ (State Health Publication No (CHS) 030147, New South Wales Corrections Health Service, 2003).

³⁵⁴ Richardson, Elizabeth and McSherry, Bernadette, ‘Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia’ (2010) 33 *International Journal of Law and Psychiatry* 249, 249.

³⁵⁵ T Butler et al, ‘Mental Disorders in Australian Prisoners: A Comparison with a Community Sample’ (2006) 40 *Australian and New Zealand Journal of Psychiatry* 272.

³⁵⁶ H R Lamb, ‘Reversing Criminalization’ (2009) 166(1) *American Journal of Psychiatry* 8.

³⁵⁷ D V James, ‘Court Diversion in Perspective’ (2006) 40 *Australian and New Zealand Journal of Psychiatry*, 529.

³⁵⁸ Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — From Crisis to Community* (2006) 20.

³⁵⁹ See, eg, Department of Human Services New South Wales, Submission MH35 to New South Wales Law Reform Commission, *Young People with Cognitive and Mental Impairments in the Criminal Justice System*, March 2011, 3; Department of Human Services New South Wales, Submission MH28 to New South Wales Law Reform Commission, *Young People with Cognitive and Mental Impairments in the Criminal Justice System*, March 2011, 20.

³⁶⁰ Esther Newit and Victor Stojcevski, ‘Mental Health Diversion List’ (Evaluation Report, Magistrates Court Tasmania, May 2009) 28.

respectively.³⁶¹ Research shows that the rates of major mental illnesses, such as schizophrenia and depression, are between three and five times higher in the offender population in Australia than in the general community.³⁶² This is evidence to suggest an association between major psychotic and affective disorders and increased rates of offending behaviours.³⁶³

In the Tasmanian Mental Health List Report,³⁶⁴ 44.6 per cent of offenders had a diagnosis of schizophrenia, 18.8 per cent bi-polar, and 8 per cent depression. Notably, of the top three most prevalent diagnoses, two are disorders for which FLRT may have utility.

Of those referred to the Mental Health Court Liaison Service in Newcastle, New South Wales, the top diagnoses were 19 per cent psychoses, 10 per cent depression, 8 per cent personality disorder, and 6 per cent bipolar disorder.³⁶⁵

In the South Australian MHDCT, 40.6 per cent program participants suffered from either an alternative affective disorder or schizophrenia. A further 19.8 per cent were diagnosed with bipolar disorder or major depression, and 10.6 per cent of participants had an intellectual disability.³⁶⁶

³⁶¹ Ibid.

³⁶² J Ogloff, 'The Identification of Mental Disorders in the Criminal Justice System' (Trends and Issues in Crime and Justice No 334, Australian Institute of Criminology, March 2007) 1.

³⁶³ P E Mullen, 'A Review of the Relationship Between Mental Disorders and Offending Behaviours and on the Management of Mentally Abnormal Offenders in the Health and Criminal Justice Services' (Criminology Research Council, 2001) 44.

³⁶⁴ Esther Newitt and Victor Stojcevski, 'Mental Health Diversion List' (Evaluation Report, Magistrates Court Tasmania, May 2009) 52.

³⁶⁵ J Sharples et al, 'Offending Behaviour and Mental Illness: Characteristics of a Mental Health Court Liaison Service' (2003) 10 *Psychiatry, Psychology and Law* 300, 306.

³⁶⁶ Nichole Hunter and Helen McRostie, Helen, 'Magistrates Court Diversion Program, Overview of Key Data Findings' (2001) 20 *Office of Crime Statistics and Research* 1.

IX CONCLUSION

The footing upon which this thesis rests has been explicated, both in terms of its therapeutic jurisprudential and neuroscientific bases. The historical and conceptual components of these bases further frame the necessary background material. Relevantly, the categorization of impulse-control sets the stage for detailed deliberations around the utility of FLRT within the existing legal framework in Chapter 4. This is preceded by Chapter 3, which situates FLRT in terms of existing models of offender-rehabilitation, and argues for its acceptance as a recognized rehabilitative treatment.

CHAPTER 3

FLRT AND THE GOOD LIVES MODEL OF OFFENDER-REHABILITATION

I INTRODUCTION

This thesis asserts that impulse-control (as an isolated issue) is important in the aetiology of offending, but it is not recognized as such. It should be the case that both the provisions of the law and psychological treatment reflect this. Currently, only people who are mentally ill with impulse-control issues are able to be diverted from the regular criminal justice system.

The previous chapter detailed the foundational bases of this thesis and, inter alia, detailed the functional operation of FLRT. In order for FLRT to become a recognized rehabilitative treatment, it must comply with current models of offender-rehabilitation. This chapter explores the theoretical compatibility of FLRT with the Good Lives Model and the Risk-Need-Responsivity Model. The chapter also addresses the practical/administrative mechanisms for treatment program acceptance in accordance with government policy. Legitimising FLRT (if only hypothetically) in a manner consistent with theories of criminal conduct and their correspondent models of offender-rehabilitation practice gives credence to the analysis of FLRT-utilization in the current legal framework, as discussed in Chapter 4.

II THEORIES OF CRIMINAL CONDUCT

A theory of criminal conduct is weak indeed if not informed by general psychology of human behavior.³⁶⁸

The currently popular, more empirically defensible, theories of crime and delinquency (and, in particular, those with aspects relevant to impulse-control) are based on key

³⁶⁸ D A Andrews and James Bonta, *The Psychology of Criminal Conduct* (LexisNexis, 5th ed, 2010) 79.

historical contributions, including the psychodynamic perspective of Sigmund Freud,³⁶⁹ the radical behavioural perspective of B F Skinner,³⁷⁰ and the cognitive behavioural perspectives of Albert Bandura,³⁷¹ Walter Mischel³⁷² and Donald Meichenbaum.³⁷³

The psychodynamic theory of criminal behaviour, with roots in the psychoanalytic perspective of Sigmund Freud, remains a source for much of current theory. The major contribution resides in Freud's description of the structure of human personality: ego and superego, 'which interact with the immediate environment and the demands of id for immediate gratification'.³⁷⁴

Put simply, the key theoretical idea is that criminal behaviour reflects psychological immaturity and particularly weak self-control in specific situations, with impulsivity being representative of a major risk factor:

Psychological maturity involves a fully developed ego and superego and is characterized by the ability to delay gratification for longer-term gain A strong superego is the psychological representation of societal rules and a strong ego is a set of coping and defense skills by which demands for immediate gratification may be delayed for longer-term gain.³⁷⁵

On a certain metaphorical level, the prefrontal cortex is the closest thing we possess to a superego.³⁷⁶

Another early theory of crime is that of Gottfredson and Hirschi,³⁷⁷ who argue that lack of self-control is the broadest and most important cause of crime.³⁷⁸

³⁶⁹ Sigmund Freud, *A General Introduction to Psychoanalysis* (New York PermaBooks, 1953).

³⁷⁰ B F Skinner, *Science and Human Behavior* (Macmillan, 1953).

³⁷¹ Albert Bandura, *Social Learning Theory* (General Learning Press, 1977).

³⁷² Walter Mischel, *Personality and Assessment* (Wiley, 1968).

³⁷³ Donald Meichenbaum, *Cognitive-Behavior Modification: A Integrative Approach* (Plenum, 1977).

³⁷⁴ D A Andrews and James Bonta, *The Psychology of Criminal Conduct* (LexisNexis, 5th ed, 2010) 17.

³⁷⁵ Ibid.

³⁷⁶ Robert M Sapolsky, 'The Frontal Cortex and the Criminal Justice System' (2004) 359 *Philosophical Transactions of the Royal Society of London Biological Sciences* 1787, 1790.

³⁷⁷ M Gottfredson and T Hirschi, *A General Theory of Crime* (Stanford University Press, 1990).

³⁷⁸ R F Baumeister and J M Boden, 'Aggression and the Self: High Self-Esteem, Low Self-Control, and Ego Threat' in R G Geen and E Donnerstein (eds), *Human Aggression: Theories, Research, and Implication for Social Policy* (Academic Press, 1998) 111.

Six dimensions of self-control are derived from the theory of Gottfredson and Hirschi: impulsivity, avoidance of difficult tasks, risk-taking, tendency to be physical rather than mentally contemplative, self-centeredness, and bad temper.³⁷⁹ Further research has revealed impulsivity to be the most important dimension of the global construct, inviting speculation that ‘low self-control, to a large extent, [may] simply [be] impulsivity’.³⁸⁰

The central idea behind this general theory of crime as posited by Gottfredson and Hirschi is that a deficit in self-control increases the propensity of individuals to commit crime. The authors theorize that persons lacking in self-control ‘tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, short-sighted, and nonverbal, and they will tend therefore to engage in criminal and analogous acts’.³⁸¹

Models of offender-rehabilitation address indicia expounded by theories of crime. Having cemented the role of impulse-control in a theoretical criminological context, the compatibility of FLRT to current models of offender-rehabilitation can be examined.

In terms of psychological treatment, impulse-control is part of current offender-rehabilitation treatment programs, but the mode of treatment delivery is cognitive rather than neuropsychological — that is to say, the therapy addresses how offenders think, not the mechanisms behind thought processes and consequent behaviour. FLRT, based on cognitive neuroscience, considers how psychological functions are produced by neural circuitry. The emergence of neuroimaging combined with sophisticated experimental techniques from cognitive psychology allows neuroscientists and psychologists to consider how human cognition and emotion are mapped to specific neural substrates. The two models are GLM and RNR and will be discussed in turn.

³⁷⁹ M Gottfredson and T Hirschi, *A General Theory of Crime* (Stanford University Press, 1990).

³⁸⁰ B J Arneklev, H G Grasmick and R J Bursik, ‘Evaluating the Dimensionality and Invariance of “Low Self-Control”’ (1999) 15 *Journal of Quantitative Criminology* 307, 327.

³⁸¹ M Gottfredson and T Hirschi, *A General Theory of Crime* (Stanford University Press, 1990) 89.

III GOOD LIVES MODEL OF OFFENDER-REHABILITATION (GLM)

FLRT could be considered a treatment consistent with the GLM of offender-rehabilitation. This is a strength-based approach³⁸² to offender-rehabilitation that provides ‘an integrative framework for assisting individuals to achieve their goals as well as managing their risk for reoffending’.³⁸³ This model asserts that

focus on people’s cognitive, behavioral and character strengths can indeed lead to improved self-regulation and positive outcomes across a range of life domains.³⁸⁴

The GLM promotes ‘pro-social and personally more satisfying goals’,³⁸⁵ with ‘attention paid to re-entry and reintegration into the social environment’.³⁸⁶ In order to motivate offenders to pursue more socially acceptable goals, it is necessary that they view alternative ways of living as personally meaningful and valuable.³⁸⁷

A *Relevance of Positive Psychology*

Positive psychology is a branch of mainstream psychology that is concerned with understanding human strengths, well-being and optimal functioning. It has been defined as ‘the scientific study of positive experiences and positive individual traits, and the institutions that facilitate their development’.³⁸⁸ Psychological intervention, from the perspective of positive psychology, seeks to balance a problem-focused approach of

³⁸² T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007); T Ward and C A Stewart, ‘The Treatment of Sex Offenders: Risk Management and Good Lives’ (2003) 34 *Professional Psychology, Research and Practice* 353.

³⁸³ Mary Barnao, Peter Robertson and Tony Ward, ‘Good Lives Model Applied to a Forensic Population’ (2010) 17 *Psychiatry, Psychology and Law* 202, 203.

³⁸⁴ K M Sheldon, T B Kashdan and M F Steger (eds), *Designing Positive Psychology: Taking Stock and Moving Forward* (Oxford University Press, 2011) 31.

³⁸⁵ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 245.

³⁸⁶ Clare-Ann Fortune, Tony Ward and Gwenda M Willis, ‘The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives’ (2012) 19 *Psychiatry, Psychology and Law* 646, 653.

³⁸⁷ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 245.

³⁸⁸ A L Duckworth, T A Steen and M E Seligman, ‘Positive Psychology in Clinical Practice’ (2005) 1 *Annual Review of Clinical Psychology* 629, 630.

offender risk-management with the promotion of human strengths and the ‘pervasive human tendency to seek meaning and purpose in life’.³⁸⁹

Relevant to positive psychology, the GLM perpetuates the assumption that ‘human beings actively seek activities or experiences that benefit them and that are associated with a sense of subjective well-being’.³⁹⁰ There are 10 fundamental (or ‘primary’) human ‘goods’ sought by all people,³⁹¹ irrespective of education, intelligence or class.³⁹² These are: life (including healthy living and physical functioning), knowledge, excellence in work and play (including pleasure and mastery experiences), agency (namely, autonomy and self-directedness), inner-peace, friendship, community, spirituality, happiness and creativity.³⁹³

Putting ‘flesh on the bones of the more abstract primary goods’,³⁹⁴ secondary goods ‘are available to individuals by way of the numerous models and opportunities for attaining goods in everyday life ... and dictate the form these goods take in specific contexts’.³⁹⁵

³⁸⁹ M E P Seligman and M Csikszentmihalyi, ‘Positive Psychology: An Introduction’ (2000) 55 *American Psychologist* 5 cited in Yilma Woldgabreal, Andrew Day and Tony Ward, ‘The Community-Based Supervision of Offenders from a Positive Psychology Perspective’ (2014) 19 *Aggression and Violent Behavior* 32, 34.

³⁹⁰ Mary Barnao, Peter Robertson and Tony Ward, ‘Good Lives Model Applied to a Forensic Population’ (2010) 17 *Psychiatry, Psychology and Law* 202, 203.

³⁹¹ L G Aspinall and U M Staudinger (eds), *A Psychology of Human Strengths: Fundamental Questions and Future Directions for a Positive Psychology* (Psychological Association, 2003); R A Cummins, ‘The Domains of Life Satisfaction: An Attempt to Order Chaos’ (1996) 38 *Social Indicators Research* 303; E L Deci and R M Ryan, ‘The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior’ (2000) 11 *Psychological Inquiry* 227; R A Emmons, *The Psychology of Ultimate Concerns* (Guilford Press, 1999); P A Linley and S Joseph, ‘Applied Positive Psychology: A New Perspective for Professional Practice’ in P A Linley and S Joseph (eds), *Positive Psychology in Practice* (Wiley, 2004) 3; M C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001); M C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

³⁹² Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 246.

³⁹³ Mary Barnao, Peter Robertson and Tony Ward, ‘Good Lives Model Applied to a Forensic Population’ (2010) 17 *Psychiatry, Psychology and Law* 202, 203.

³⁹⁴ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 246.

³⁹⁵ Ibid.

The twin focus of the GLM regarding therapy with offenders is to promote individuals' important personal goals while concurrently reducing and managing their risk for future offending.³⁹⁶ A major aim is to equip the offender with the skills, values, attitudes and resources to obtain primary goods in socially acceptable ways.³⁹⁷ In assisting offenders to create personally meaningful and satisfying lives, the scope and quality of primary goods available to them are increased. Through its emphasis on assisting offenders to create and implement their conception of a good life while reducing their risk, the GLM promotes positive or approach goals, thereby enhancing motivation to change. A GLM leads to the development of tailored case formulations and treatment plans that address the critical role of contextual factors in both the process of offending and in rehabilitation. The GLM promotes offender engagement and arguably offers a comprehensive understanding of offending.

It follows that the role of FLRT — placing the offender in the driver's seat of his own neural circuitry³⁹⁸ — is representative of the 'holistic'³⁹⁹ perspective perpetuated by the GLM, whereby offenders are empowered to address their own rehabilitative needs. The simplicity of the goal of FLRT is to enhance a person's capacity for long-term decision-making, and the technology, together with other new developments, may reinvigorate the discussion of possibilities for customized rehabilitation.⁴⁰⁰ This further capitalizes on the contention of the GLM that '[g]oal-directedness is a human enterprise'.⁴⁰¹

³⁹⁶ T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007); T Ward and C A Stewart, 'The Treatment of Sex Offenders: Risk Management and Good Lives' (2003) 34 *Professional Psychology, Research and Practice* 353.

³⁹⁷ Peter Robertson, Mary Barnao and Tony Ward, 'Rehabilitation Frameworks in Forensic Mental Health' (2011) 16 *Aggression and Violent Behavior* 472, 480.

³⁹⁸ In other words, users can view a graphical representation of the amount of activity in particular areas of their brain (say, as a bar that moves up or down), and they can work to control it.

³⁹⁹ Michael S King and Steve Ford, 'Exploring the Concept of Well-Being in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 11 <<https://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>; Michael S King, 'Applying Therapeutic Jurisprudence in Regional Areas — The Western Australian Experience' (2003) 10(2) June para 37 *eLaw Journal: Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>>.

⁴⁰⁰ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 250.

⁴⁰¹ R A Emmons, 'Striving and Feeling: Personal Goals and Subjective Well-Being' in P M Gollwitzer and J A Bargh (eds), *The Psychology of Action: Linking Cognition and Motivation to Behavior* (Guilford, 1996) 331.

The construct of psychological flexibility is also relevant and is recognized by positive psychology researchers and practitioners. A component of the rational frame theory⁴⁰² — which assumes that meanings derived from everyday use of language exert a powerful influence on psychological processes — psychological flexibility refers to one's ability to 'adapt to fluctuating situational demands, reconfigure mental resources, shift perspective, and balance competing desires, needs, and life domains'.⁴⁰³ From the perspective of offender supervision, psychological flexibility refers to the extent to which an offender's internal resources (strengths) can be utilized to facilitate pro-social pursuits. Hence, what might distinguish offenders who desist from crime from those who persist may be their ability to flexibly utilize their cognitive repertoires to pursue goals in pro-social ways. This means that individuals who are psychologically flexible will be less likely to maladaptively respond to negative thoughts, feelings and behaviours.⁴⁰⁴

We suggest that offenders will be ready to change their offending behaviour to the extent that they possess certain cognitive, emotional, volitional, and behavioural properties and live in an environment where such changes are possible and supported. More specifically, offenders need to possess the capacities and inclination to change their behaviour in general, solve a particular problem, accept a particular intervention, and to do all this at a particular time (now versus some future date).⁴⁰⁵

⁴⁰² S C Hayes, D Barnes-Holmes and B Roche (eds) *Relational Frame Theory: A Post-Skinnerian Account of Human Language and Cognition* (Kluwer Academic, 2001).

⁴⁰³ T B Kashdan and J Rottenberg, 'Psychological Flexibility as a Fundamental Aspect of Health' (2010) 30 *Clinical Psychology Review* 865, 866.

⁴⁰⁴ F W Bond et al, 'Preliminary Psychometric Properties of the Acceptance and Action Questionnaire-II: A Revised Measure of Psychological Inflexibility and Experiential Avoidance' (2011) 42 *Behavior Therapy* 676; S C Hayes et al, 'Acceptance and Commitment Therapy: Model, Processes and Outcomes' (2006) 44 *Behavior Research and Therapy* 1.

⁴⁰⁵ Tony Ward and Mark Brown, 'The Good Lives Model and Conceptual Issues in Offender Rehabilitation' (2004) 10 *Psychology, Crime and Law* 243, 250.

For C2, C3 and C4 offenders, the GLM can be extended to offenders with mental health concerns (GLM-FM) and posits that the presence of mental illness ‘acts as a major obstacle to the attainment of an individual’s pursuit of primary goods’.⁴⁰⁶

The GLM-FM is underpinned by a comprehensive rehabilitation theory and it integrates both risk and rehabilitation perspectives. It provides clinicians with a broad and flexible framework for addressing offending, treating mental illness, and assisting with other clinical needs.⁴⁰⁷ It represents a departure from rehabilitative initiatives directed solely toward risk reduction, whereby ‘offenders with significant psychological problems who are not designated as high risk may not receive treatment’.⁴⁰⁸

The GLM-FM is a strength-based, client-centered, and recovery-oriented approach that combines a humanistic approach to rehabilitation with the imperative of protecting society. Although further operationalization and testing will be required to enable GLM-FM to develop into a robust, evidence-based, clinical framework that forensic mental health practitioners will use,⁴⁰⁹ its framework is such that it houses FLRT aptly. In keeping with the idea of viewing offenders as more than simply ‘bearers of risk’,⁴¹⁰ the consistency of FLRT to the GLM of offender-rehabilitation is further evidenced. Augmenting risk or deficit-focused offender-rehabilitation practice with a strength-based approach, of which FLRT could be a part, could be most beneficial in recidivism reduction. Promoting psychological flexibility also assists offenders to move toward leading pro-social lives.

⁴⁰⁶ Peter Robertson, Mary Barnao and Tony Ward, ‘Rehabilitation Frameworks in Forensic Mental Health’ (2011) 16 *Aggression and Violent Behavior* 472, 480.

⁴⁰⁷ Ibid 483.

⁴⁰⁸ Tony Ward and Astrid Birgden, ‘Accountability and Dignity: Ethical Issues in Forensic and Correctional Practice’ (2009) 14 *Aggression and Violent Behavior* 227, 229.

⁴⁰⁹ Peter Robertson, Mary Barnao and Tony Ward, ‘Rehabilitation Frameworks in Forensic Mental Health’ (2011) 16 *Aggression and Violent Behavior* 472, 483.

⁴¹⁰ Clare-Ann Fortune, Tony Ward and Gwenda M Willis, ‘The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives’ (2012) 19 *Psychiatry, Psychology and Law* 646, 657.

IV RISK-NEED-RESPONSIVITY (RNR) MODEL

[A] psychological “understanding” of criminal conduct is crucial to effective correctional programming.⁴¹¹

Many current forensic psychology practitioners integrate principles from the GLM with the more traditional therapeutic model of offender-rehabilitation: the RNR model. First developed by Andrews and Bonta,⁴¹² the RNR model is ‘a theoretical framework that outlines both the central causes of persistent criminal behaviour, and some broad principles for reducing engagement in crime’.⁴¹³ Founded on three core principles of offender classification — risk, need and responsivity — the RNR model is an empirically validated guide for criminal justice interventions that aim to help offenders to depart from that system.⁴¹⁴ Its strengths as a theoretical framework for offender-rehabilitation are substantial: it distils a large volume of aetiological and intervention-related information into a series of transparently simple principles for application.⁴¹⁵

Key assumptions of the RNR model are that certain empirically based social and psychological risk factors are associated with offending, that an offender’s level of risk increases with the presence of each additional risk factor, and that targeting dynamic (that is, potentially changeable factors that give rise to offending) risk factors in treatment will reduce reoffending rates. The *risk principle* holds that the greatest level of resources should be directed to the highest-risk group of offenders. The *need principle* states that interventions should address empirically based dynamic risk factors or criminogenic needs such as distorted cognitions, substance abuse or antisocial peers. The *responsivity principle* stipulates that programs should be tailored to match the individual

⁴¹¹ D A Andrews, James Bonta and R D Hodge, ‘Classification for Effective Rehabilitation: Rediscovering Psychology’ (1990) 17(1) *Criminal Justice and Behavior* 19, 22.

⁴¹² Ibid.

⁴¹³ Devon L L Polaschek, ‘An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and its Application in Correctional Treatment’ (2012) 17 *Legal and Criminological Psychology* 1, 2.

⁴¹⁴ Ibid 1.

⁴¹⁵ Ibid 2.

characteristics and environment (for example, learning style, intellectual level and culture) of the offender in order to be optimally effective in reducing risk.⁴¹⁶

The general personality and social psychology underlying the RNR model of rehabilitation recognizes the importance of the personal, interpersonal and relatively automatic sources of control over human behaviour, as well as the power of cognitive-social-learning approaches to interpersonal influence, in many social settings.⁴¹⁷

Within the RNR model, there are eight criminogenic needs, of which impulse-control is one. Arguably, impulse-control is embedded within all risk factors, thus heightening the utility and relevance of FLRT to both the GLM and the RNR model.

As the GLM is a strength-based model, the RNR model is a risk-reduction model. It assumes that (a) intervening to help offenders reduce their involvement in crime benefits them and the community around them, and (b) the only way to intervene effectively is through compassionate, collaborative and dignified human service intervention that targets change on factors that predict criminal behaviour.⁴¹⁸

⁴¹⁶ Peter Robertson, Mary Barnao and Tony Ward, 'Rehabilitation Frameworks in Forensic Mental Health' (2011) 16 *Aggression and Violent Behavior* 472, 475.

⁴¹⁷ D A Andrews and Craig Dowden, 'The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence' (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 439, 439.

⁴¹⁸ Devon L L Polaschek, 'An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and its Application in Correctional Treatment' (2012) 17 *Legal and Criminological Psychology* 1, 3.

A Risk

Risk assessment is the process of determining an individual's potential for harmful behavior. It entails consideration of a broad array of factors related to the person, the situation, and their interaction.⁴¹⁹

There are two aspects of the risk principle: prediction and matching. Prediction comprises assessment of risk factors. These refer to personal attributes and circumstances that are assessable prior to service and are predictive of future criminal behaviour. Matching refers to the notion that higher levels of service are reserved for higher-risk cases because they respond better to intensive service than to less intensive service. Lower-risk cases flourish with minimal, as opposed to, more intensive service. Therefore, offenders' current risk level should be identified prior to making intervention decisions.⁴²⁰

predictability of recidivism increases still further when actual changes in the person and circumstances of offenders are monitored.⁴²¹

B Need

The need principle of the RNR model refers to the targets for change. Criminogenic needs are dynamic attributes of offenders and their circumstances that, when changed, are followed by changes in recidivism. Targets of service are matched with the criminogenic needs of offenders. Needs are case characteristics that are associated with changes in the chance of recidivism. If reduced recidivism is the ultimate goal, the more effective services are those that set reduced criminogenic need as the intermediate target of service.

⁴¹⁹ R Blackburn, 'Risk Assessment and Prediction' in J T McGuire, T Mason and A O'Kane (eds), *Behavior, Crime and Legal Processes: a Guide for Legal Practitioners* (John Wiley and Sons, 2000) 179.

⁴²⁰ Devon L L Polaschek, 'An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and its Application in Correctional Treatment' (2012) 17 *Legal and Criminological Psychology* 1, 3.

⁴²¹ D A Andrews, James Bonta and R D Hodge, 'Classification for Effective Rehabilitation: Rediscovering Psychology' (1990) 17(1) *Criminal Justice and Behavior* 19, 31.

Criminogenic needs are a subset of risk factors: ‘They are dynamic attributes of offenders and their circumstances that, when changed, are associated with changes in the chances of recidivism.’⁴²²

C *Responsivity*

The third core principle of the RNR model is responsivity, also described as the ‘how’ of intervention: designing and delivering services in ways that engage offenders, and help them to learn and change. General responsivity refers to general techniques and processes: behavioural and cognitive-behavioural techniques such as teaching skills and reinforcing pro-social behaviour.⁴²³

Specific responsivity refers to variations among offenders in the styles and modes of service to which they respond. Behavioural and cognitive behavioural interventions are tailored to the cognitive ability of the offender. Styles and modes of service, or ‘treatment strategies’,⁴²⁴ are matched to the learning styles and abilities of offenders. Service is matched not only to criminogenic need, but also to those attributes and circumstances of cases that render individuals likely to profit from that particular type of service.

It is widely accepted that ‘[r]isk, need and responsivity considerations provide reasonable guides to service and research in rehabilitation’.⁴²⁵ ‘Assignment of offenders to agencies/programs that do not adhere to RNR does not reduce crime.’⁴²⁶

⁴²² Ibid.

⁴²³ Devon L L Polaschek, ‘An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and its Application in Correctional Treatment’ (2012) 17 *Legal and Criminological Psychology* 1, 3.

⁴²⁴ D A Andrews, James Bonta and J Stephen Wormith, ‘The Recent Past and Near Future of Risk and/or Need Assessment’ (2006) 52(1) *Crime and Delinquency* 7, 7.

⁴²⁵ D A Andrews, James Bonta and R D Hodge, ‘Classification for Effective Rehabilitation: Rediscovering Psychology’ (1990) 17(1) *Criminal Justice and Behavior* 19, 45.

⁴²⁶ D A Andrews and Craig Dowden, ‘The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence’ (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 439, 458.

The three core principles of the RNR model are accompanied by ‘overarching principles’, ‘additional clinical principles’, and ‘organizational principles’.⁴²⁷ Overarching principles include (a) respect for the person and the normative context, (b) basing the programs on empirically validated psychological theory, and (c) the importance and legitimacy of services that prevent crime, even when those services are located outside the criminal justice system. Additional clinical principles state that programs should target multiple criminogenic needs (breadth), should assess strengths, both for risk prediction and responsivity, use structured assessments of risk, and use professional discretion occasionally on well-reasoned and well-documented grounds. Organizational principles recognize intervention contexts and needed resources. They state that community-based interventions are preferable, that staff practice both the relationship and structuring principles with offenders, and that management must provide, develop and support the staff and other resources needed.⁴²⁸

The RNR model systematically targets risk factors associated with recidivism. Treatment programs are problem-focused and aim to eradicate or reduce the various psychological and behavioural difficulties associated with offending.⁴²⁹ The model has resulted in effective treatment and a reduction in recidivism rates.⁴³⁰ The focus is on the reduction of maladaptive behaviours, the elimination of distorted beliefs, the removal of problematic desires, and the modification of offence-supportive emotions and attitudes.⁴³¹ In essence, the goals are avoidant in nature and emphasize ‘hypervigilance around potential threats of relapse and the reduction of criminogenic risk factors’.⁴³²

⁴²⁷ D A Andrews and James Bonta, *The Psychology of Criminal Conduct* (LexisNexis, 5th ed, 2010); D A Andrews, J Bonta and J S Wormith, ‘The Risk-Need Responsivity Model: Does the Good Lives Model Contribute to Effective Crime Prevention?’ (2011) 38 *Criminal Justice and Behavior* 735.

⁴²⁸ D A Andrews and James Bonta, *The Psychology of Criminal Conduct* (LexisNexis, 5th ed, 2010).

⁴²⁹ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 245.

⁴³⁰ C R Hollin, ‘Treatment Programs for Offenders: Meta-Analysis, ‘What Works’ and Beyond’ (1999) 22 *International Journal of Law and Psychiatry* 361.

⁴³¹ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 245.

⁴³² R E Mann, ‘Managing Resistance and Rebellion in Relapse Prevention Intervention’ in D R Laws, S M Hudson and T Ward (eds), *Remaking Relapse Prevention with Sex Offenders: A Sourcebook* (Sage Publications, 2000) 187.

Recidivism is reduced when offenders are taught ‘how to manage aspects of their lives that elevate risk rather than simply presuming a deterrent value to punishment alone’.⁴³³ Furthermore, the RNR model has been ‘imported from the correctional setting to the forensic context with mental illness being incorporated as an additional risk factor’.⁴³⁴

D *Crime Prevention Jurisprudence (CPJ)*

The RNR model, and the psychology that underlies it, may also assist justice agencies and the courts through crime prevention jurisprudence (CPJ).⁴³⁵ ‘Understanding and promotion of crime prevention will be enhanced when the justice system is informed by a strong psychology of human behaviour.’⁴³⁶ ‘Overall then, the introduction of a general human psychology into the crime-prevention aspects of the law and justice is not too great a stretch for jurisprudence or for psychology.’⁴³⁷

According to CPJ, a purpose of the courts is to apply sanctions in a manner consistent with sentencing legislation and to do so with regard to offending-reduction through applications of the RNR model and an evidence-based, interdisciplinary understanding of the psychology of the criminal behaviour of individuals. Judges and the prosecuting and defence attorneys may reduce, increase or have no effect on criminal behaviour, depending upon their actions with respect to those offenders before the court. The actions of judges and lawyers, the court process, and the sanction itself may affect causally

⁴³³ P Gendreau, ‘Offender Rehabilitation: What We Know and What Needs to be Done’ (1996) 23 *Criminal Justice and Behavior* 144; D A Andrews and James Bonta, *The Psychology of Criminal Conduct* (LexisNexis, 5th ed, 2010).

⁴³⁴ Peter Robertson, Mary Barnao and Tony Ward, ‘Rehabilitation Frameworks in Forensic Mental Health’ (2011) 16 *Aggression and Violent Behavior* 472, 477.

⁴³⁵ D A Andrews and Craig Dowden, ‘The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence’ (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 439, 439.

⁴³⁶ Ibid 455.

⁴³⁷ Ibid.

significant factors and thereby increase or decrease reoffending.⁴³⁸ Relevantly, this may be touted as ‘an exercise in therapeutic jurisprudence’.⁴³⁹

The relevance of FLRT to the RNR model is typified thus:

Human beings are active, conscious, and wilful, and they are goal-oriented. They are also creatures with biological predispositions and with habits and conditioning histories whereby repeated associations among stimuli, responses, and behavioural outcomes can produce automatic, non-conscious cognitive regulation of motivation, perception, and behaviour. Their behaviour is under personal control, interpersonal control, and automatic control.⁴⁴⁰

Returning to the significance of impulse-control in a theoretical criminological context, it is important to consider the following:

To do anything, the self has to keep its own inner house in order, such as by organizing its actions toward goals, avoiding swamps of emotional distress, obeying laws, and internalizing society’s standard of good (both moral and competent) behavior.⁴⁴¹

The role of FLRT in the management of impulsivity, a dimension of self-control,⁴⁴² is one that could be assimilated into existing models of offender-rehabilitation. For example, FLRT may form an adjunct to self-control assessments. Such assessments provide a direct indication of an individual’s ability to monitor, evaluate and deliver self-instructions, cope with temptations, and self-deliver meaningful consequences. The exercise of self-control is assessed with reference to criminal activity, depending on the standards of the individual. These standards are assessed through an examination of personal attitudes, values, beliefs, rationalizations, cognitive-emotional states, and identities supportive or not supportive of criminal activity. The anti-criminal or pro-criminal nature of standards is also influenced by the anti-criminal, pro-criminal, or neutral position of significant others in regard to antisocial behaviour.⁴⁴³

⁴³⁸ Ibid 442.

⁴³⁹ Ibid 441.

⁴⁴⁰ Ibid 442.

⁴⁴¹ R F Baumeister and K D Vohs, *Handbook of Self-Regulation: Theory, Research, and Application* (Guilford New York, 2004) xi.

⁴⁴² M Gottfredson and T Hirschi, *A General Theory of Crime* (Stanford University Press, 1990).

⁴⁴³ D A Andrews and Craig Dowden, ‘The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence’ (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 439, 442.

Furthermore, it is recommendable to actively engage an offender in his or her own rehabilitation process.⁴⁴⁴ With real-time fMRI, direct feedback is given to an offender and therefore success can be directly measured. In that sense the offender is part of a ‘game’ against his or her own brain and thus actively engaged in the process. By designing real-time fMRI as a sort of ‘computer game’,⁴⁴⁵ and thus making it increasingly visual, the method is more accessible for the offender. On top of this, the method might arouse the patient’s ambition to achieve high scores in the ‘game’ and hence the willingness to participate in more sessions in order to continuously increase the scores. Engaging FLRT not only strengthens the neural pathways that care about long-term consequences, but also enables fMRI to reveal ‘how goals are represented at the neural level’ and the corresponding ‘brain activity associated with goal-directed behavior’,⁴⁴⁶ providing direct support for the following:

In brief, human behaviour, criminal and non-criminal, is outcome-oriented and the chances of any act occurring increase with the density of the signalled rewards (that is, the number, variety, quality, frequency, immediacy, and regularity of rewards). The chances decrease with the signalled density of the costs.⁴⁴⁷

V FLRT AS A RECOGNIZED TREATMENT PROGRAM

Although ‘[t]here continues to be a paucity of legislative guidance for the delivery of offender-rehabilitation programs’,⁴⁴⁸ for the purposes of this thesis, FLRT is proffered as a treatment in keeping with current recognized offender-rehabilitation models: both the GLM and the RNR model. Because FLRT has utility for offenders in all categories (with the exception of those mental illnesses stipulated), managing the impulse-control part of

⁴⁴⁴ J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386, 388.

⁴⁴⁵ R Goebel et al, ‘BOLD Brain Pong: Self-Regulation of Local Brain Activity During Synchronously Scanned, Interacting Subjects’ (Program No 376.2, Society for Neuroscience, Washington, 2004).

⁴⁴⁶ Owen D Jones et al, ‘Law and Neuroscience: Recommendations Submitted to the President’s Bioethics Commission’ (2014) *Journal of Law and the Biosciences* 224, 225.

⁴⁴⁷ D A Andrews and Craig Dowden, ‘The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence’ (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 439, 444.

⁴⁴⁸ Karen Heseltine, Andrew Day and Rick Sarre, ‘Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia’ (Report No 112, Australian Institute of Criminology, 2011) 39.

mentally ill/non-mentally ill offenders in both diversionary mechanisms and regular criminal justice system is possible.

The Minister for Corrections would have authority to sanction the accreditation of FLRT and its inclusion in Correctional Offender-Rehabilitation Programs.⁴⁴⁹ As a legitimate, accredited treatment program, FLRT could then be utilized as a court-mandated opportunity for offender-rehabilitation through mental health diversionary mechanisms and the regular criminal justice system in each State and Territory in Australia.

Correctional Services in each State and Territory in Australia have mechanisms through which offender-rehabilitation programs are endorsed. For example, Queensland Corrective Services approves applications for the provision of programs and services in a variety of areas, the most relevant being Offender Behaviour Programs.⁴⁵⁰ The application requires detailed information regarding the following:

- the organization providing the proposed program;
- the qualifications of staff delivering the program;
- the program particulars;
- the identification of appropriate program participants;
- the funding source;
- the theoretical model(s) upon which the program is based;
- the method of program delivery;
- the area of need targeted by the program and its relationship to offending behaviour;
- the reporting of program participation (for example, participant outcome measures on clinical assessment tools and standard completion letters including the number of sessions attended, as well as brief comments on engagement and compliance with in-session and out-of-session activities and tasks);

⁴⁴⁹ Ibid 35.

⁴⁵⁰ Queensland Corrective Services, *Administrative Form – Application to Provide a Program or Service* (2015)
<http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/index.shtml>.

- the program evaluation and monitoring mechanisms;
- the dynamic risk factors addressed by the program;
- the skills-oriented content of the program;
- the program intensity and duration;
- the monitoring of engagement and motivation of program participants;
- the measures in place to maintain program integrity (to ensure that the program is delivered as intended through mandatory training, supervision and/or monitoring and auditing); and
- the evaluation of the program on an on-going basis (for example, the utilization of an independent advisory board).⁴⁵¹

Programs offered to offenders are to be based on best practice and have solid evidence as to their efficacy.⁴⁵² As a court-mandated treatment, FLRT would be an example of where courts partner with community-based programs licensed by the State to provide treatment, in conjunction with judicial monitoring. Treatment Reports, detailing an offender's progress in the program, would then be available to the court for use in sentencing. This is elaborated upon in Chapter 7.

VI CONCLUSION

In order for the provisions of the law and psychological treatment to reflect the importance of impulse-control in the aetiology of offending, this chapter has detailed the alignment of FLRT to theories of criminal conduct and practical treatment models such as the GLM and the RNR model.

An application to provide FLRT to offenders could be made to Correctional Services in accordance with the appropriate administrative mechanisms. If approved, FLRT would be

⁴⁵¹ Ibid.

⁴⁵² Deborah Glass, 'Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria' (Discussion Paper, Victorian Ombudsman, October 2014) 9.

a recognized rehabilitative treatment program, thereby available to offenders. The following chapter reviews the existing court-mandated opportunities for FLRT-utilization for categorized impulse-control management as part of offender-rehabilitation through mental health diversionary mechanisms and/or the regular criminal justice system in each State and Territory in Australia.

CHAPTER 4

FLRT-UTILIZATION FOR IMPULSE-CONTROL MANAGEMENT WITHIN THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

I INTRODUCTION

The previous chapter detailed the compatibility of FLRT with accepted theories of crime, and in particular, the theory of Gottfredson and Hirschi,⁴⁵³ who posit that a deficit in self-control increases the propensity of individuals to commit crime. Chapter 3 also addressed the concordance of FLRT with the widely recognized models of offender-rehabilitation, the GLM and the RNR model. The formalities of FLRT becoming a legitimate treatment program were also addressed.

This chapter considers how FLRT, if it were to be an accepted treatment, could be utilized within the existing Australian legal framework. This includes an examination of diversionary mechanisms and the regular criminal justice system in each State and Territory of Australia. FLRT-utilization for categorized impulse-control management, as established in Chapter 2, will also be addressed and summarized in a table at the end. The chapter commences with an overview of mental health and the criminal justice in Australia and proceeds to an examination of the various types of diversion available, and details diversion-appropriate offending.

II MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA

In Australia, a great deal of discrepancy exists in relation to options for offenders with a mental illness. Under the federal system, each of the six States and two Territories have separate mental health and criminal justice systems, which gives rise to significantly

⁴⁵³ M Gottfredson and T Hirschi, *A General Theory of Crime* (Stanford University Press, 1990).

different approaches in each jurisdiction.⁴⁵⁴ The Commonwealth and each State and Territory have provisions in their criminal laws for the prosecution and disposition of persons with a mental illness or an intellectual disability.⁴⁵⁵ In most jurisdictions, criminal legislation and other relevant Acts, such as bail and sentencing Acts, interact with mental health services through the operation of mental health Acts.⁴⁵⁶ Most jurisdictions have provisions at the court level for diverting mentally or intellectually impaired defendants from the traditional court system where appropriate.⁴⁵⁷

In many Australian States, specific legislation empowers magistrates and judges to defer taking a plea or sentencing to enable a person to undertake a diversion program before sentence. In general, all States and Territories have sentencing legislation that enables courts to dispense good behaviour bonds or adjourned undertakings or to defer sentencing.⁴⁵⁸ Under their mental health Acts, most jurisdictions have established special courts or services designed to assess the mental health of persons arrested or brought before the courts on criminal charges and to divert into treatment those found to have a mental illness.⁴⁵⁹

The States and Territories have also established mental health liaison programs designed to assess the mental health of persons who come before the courts. In most Australian jurisdictions, mentally ill people may be diverted by the courts from the criminal justice system to the health system. Magistrates' courts may make orders for treatment of offenders following advice received from the relevant court liaison service.

⁴⁵⁴ Elizabeth Richardson and Bernadette McSherry, 'Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry* 249, 249.

⁴⁵⁵ Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — from Crisis to Community* (December 2006) 13.2.

⁴⁵⁶ Ibid 13.4.

⁴⁵⁷ Jacqueline Joudo, 'Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs' (Research and Public Policy Series No 88, Australian Institute of Criminology, 2008) 53.

⁴⁵⁸ Elizabeth Richardson and Bernadette McSherry, 'Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry* 249, 252.

⁴⁵⁹ Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — from Crisis to Community* (December 2006) 13.12.

III TYPES OF DIVERSION

Traditionally the term ‘diversion’ meant diversion out of the criminal justice system altogether. However, the term is now also commonly used to describe programs that initially increase contact with the criminal justice system through treatment and supervision, but which are aimed at reducing contact with the criminal justice system over time.

A *Mental Health Diversion Courts (MHDCts)*

Mental Health Diversion Courts originated in the United States of America, as a responsive initiative of individual judges.⁴⁶⁰ Mental health diversion courts are a type of problem-solving court, similar to drug courts, which function as a dedicated court for processing people with a mental illness.⁴⁶¹ Described as a ‘practical legal innovation’,⁴⁶² mental health diversion courts are a broadly defined category: there are no accepted, specific criteria of what constitutes such a court. Each mental health diversion court is unique, and the way in which a mental health court operates in each jurisdiction is generally determined by the particular deficiencies in the mental health and criminal justice system perceived to exist in the individual jurisdiction.⁴⁶³ However, mental health courts all generally attempt ‘a rehabilitative response to what would otherwise have been criminally sanctioned behaviour’.⁴⁶⁴

⁴⁶⁰ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 38.

⁴⁶¹ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009); D V James, ‘Court Diversion in Perspective’ (2006) 40 *Australian and New Zealand Journal of Psychiatry* 529; H Steadman, S Davidson and C Brown, ‘Mental Health Courts: Their Promise and Unanswered Questions’ (2001) 52 *Psychiatric Services* 457.

⁴⁶² George Ackerman, *Law and Courts: Current Perspective from InfoTrac* (Wadsworth Cengage Learning, 2011) 8.

⁴⁶³ R D Schneider, H Bloom and M Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Irwin Law, 2007) 102.

⁴⁶⁴ *Ibid* 103.

In the United States of America, the Council of State Governments Justice Center⁴⁶⁵ has suggested that an appropriate working definition of a mental diversion health court is:

a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing. Participants are identified through mental health screening and assessments and voluntarily participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals. Incentives reward adherence to the treatment plan or other court conditions, nonadherence may be sanctioned, and success or graduation is defined according to predetermined criteria.

Currently in Australia, two programs are in operation that have adopted the problem-solving court model: the Magistrates Court Diversion Program in South Australia, and the Mental Health and Cognitive Diversion List in Tasmania. Both include judicial supervision and a collaborative team approach between mental health professionals, lawyers for the defence and the prosecution, and the court.⁴⁶⁶

B *Court Diversion and Liaison Services*

Another method of dealing with mentally ill offenders is through court diversion and liaison schemes. The objectives of court diversion and liaison programs are ‘to provide court-based mental health assessments, and where appropriate, to divert mentally ill offenders from the criminal justice system and to link them with appropriate psychiatric services in hospitals or in the community’.⁴⁶⁷

⁴⁶⁵ Council of State Governments Justice Center, ‘Mental Health Courts — A Primer for Policymakers and Practitioners’ (Report, Council of State Governments Justice Center, 2008) 4.

⁴⁶⁶ A Zammit, ‘Disability and the Courts’ (Victoria: Office of Public Advocate, 2004).

⁴⁶⁷ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009); L Birmingham, ‘Diversion from Custody’ (2001) 7 *Advances in Psychiatric Treatment* 198; D James, ‘Court Diversion at 10 Years: Can It Work, Does It Work and Has It a Future?’ (1999) 10 *Journal of Forensic Psychiatry* 507; D V James, ‘Court Diversion in Perspective’ (2006) 40 *Australian and New Zealand Journal of Psychiatry* 529; Elizabeth Richardson, ‘Mental Health Courts and Diversion Programs for Mentally Ill Offenders: The Australian Context’ (Paper presented at the Annual IAFMHS Conference, Vienna, Austria, 14–16 July 2008).

In contrast to mental health court models, these services do not engage in follow-up supervision of offenders once diverted from court.⁴⁶⁸ While some variation exists across schemes in relation to operational structure, many services are staffed by psychiatric teams who provide a link between the criminal justice system and the health system. Most mental health court liaison services provide an assessment, referral and advice service to the court. Importantly, ‘court diversion does not equate with discontinuation of criminal prosecution; it allows for the two systems of diversion and prosecution to work in a collaborative manner’.⁴⁶⁹

Most jurisdictions in Australia have established court liaison/diversion services for mental health or specialized courts/lists, for the purpose of assessing and diverting mentally ill individuals from the criminal justice system into treatment.⁴⁷⁰ In New South Wales, for example, the Statewide Community and Court Liaison Service operates as a court-based diversion program, and Victoria has an Assessment and Referral Court List, as well as a Mental Health Court Liaison Service. Although in its infancy, with a consequent paucity of information, the Specialist Treatment and Assessment Referral Team Court commenced operation in March 2013 in Western Australia, operating out of Perth Magistrates Court. Neither the Northern Territory nor the Australian Capital Territory, however, have any mental health diversion mechanism.

⁴⁶⁸ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009); Elizabeth Richardson, ‘Mental Health Courts and Diversion Programs for Mentally Ill Offenders: The Australian Context’ (Paper presented at the Annual IAFMHS Conference, Vienna, Austria, 14–16 July 2008).

⁴⁶⁹ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009); D Greenberg and B Nielsen, ‘Court Diversion in NSW for People with Mental Health Problems and Disorders’ (2002) 13 *NSW Public Health Bulletin* 158; D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual* (NSW Justice Health, 2002) 159.

⁴⁷⁰ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009); Elizabeth Richardson, ‘Mental Health Courts and Diversion Programs for Mentally Ill Offenders: The Australian Context’ (Paper presented at the Annual IAFMHS Conference, Vienna, Austria, 14–16 July 2008); Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — From Crisis to Community* (2006).

IV DIVERSION-APPROPRIATE OFFENDING

Diversion is appropriate for lower-level offending or that which typically comes before courts of summary jurisdiction, such as summary and minor indictable offences.

A summary offence⁴⁷¹ is an offence that can be heard by a magistrate sitting alone, rather than a judge and jury. Known also as ‘simple offences’⁴⁷² in Queensland, Western Australia and Tasmania, summary offences can be heard in the absence of the defendant. Such offences are usually considered to be less serious and generally carry a maximum penalty of two years’ imprisonment.⁴⁷³ Examples include road traffic offences, petty crime, assaults, property damage and offensive behaviour.

Indictable offences,⁴⁷⁴ in contrast, are more serious offences that cannot be heard in the absence of the defendant. Such offences are triable by either a judge and jury, or summarily. Some of these offences, although considered serious, may be heard in the Magistrates’ Court where the court considers it is appropriate for the offence to be dealt with by a magistrate.

‘Minor indictable’⁴⁷⁵ offences are dealt with in the Magistrates’ Court unless the defendant chooses to have the charge dealt with in a superior court. An example of a minor indictable offence triable is an offence involving interference with, damage to, or destruction of, property where the loss resulting from commission of the offence does not exceed \$30,000.⁴⁷⁶

Thus, in its criminal jurisdiction, the Magistrates’ Court has the power to: hear and determine all summary offences; hear and determine all indictable offences triable

⁴⁷¹ See, eg, *Criminal Procedure Act 1986* (NSW) s 6; *Criminal Procedure Act 2009* (Vic) s 3; *Summary Procedure Act 1921* (SA) s 5.

⁴⁷² *Criminal Code 1899* (Qld) s 3(5); *Criminal Code Act Compilation Act 1913* (WA) s 3(5); *Justices Act 1959* (Tas) s 3.

⁴⁷³ See, eg, *Criminal Procedure Act 1986* (NSW) s 6; *Summary Procedure Act 1921* (SA) s 5.

⁴⁷⁴ See, eg, *Crimes Act 1900* (NSW) s 4; *Summary Procedure Act 1921* (SA) s 5; *Justices Act 1959* (Tas) s 3.

⁴⁷⁵ See, eg, *Summary Procedure Act 1921* (SA) s 5; *Crimes Act 1900* (NSW) s 4.

⁴⁷⁶ See, eg, *Summary Procedure Act 1921* (SA) s 5.

summarily; and conduct committal proceedings into indictable offences.⁴⁷⁷ Generally, offences of a violent or sexual nature are excluded from diversionary programs, as diversion is often regarded as an inappropriate response to serious offending,⁴⁷⁸ the inevitability of punitive recourse prevailing.

Relevantly, according to data collected by MHDCts, the most prevalent offences committed by mentally impaired people, appear to be minor offences such as trespass, public transport offences, property damage, shoplifting, disorderly conduct and nuisance offences.⁴⁷⁹ Furthermore, data from a relevantly recent Tasmania Mental Health List Report⁴⁸⁰ show that 26.2 per cent of offences were committed against justice procedures,⁴⁸¹ 23.3 per cent were theft and related offences,⁴⁸² and 16.5 per cent were traffic regulatory offences.⁴⁸³ And in the South Australian MHDCt, almost one-half of all offences laid against program participants were against property (47.0 per cent), just over one-quarter involved an offence against good order (27.9 per cent), and driving offences accounted for about 10 per cent of all offences laid.⁴⁸⁴

⁴⁷⁷ See, eg, *Magistrates' Court Act 1989* (Vic) s 25(1).

⁴⁷⁸ New South Wales Law Reform Commission, 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion' (Report 135, New South Wales Law Reform Commission Report, June 2012) 12.

⁴⁷⁹ Magistrates Court Tasmania, *Mental Health Diversion List Procedural Manual* (April 2007) 3; Grace Skrzypiec, Joy Wundersitz and Helen McRostie, 'Magistrates Court Diversion Program, An Analysis of Post-Program Offending' (2004) *Office of Crime Statistics and Research* 1; New South Wales Law Reform Commission, 'People with an Intellectual Disability and the Criminal Justice System' (Report 80, New South Wales Law Reform Commission Report, December 1996) 32.

⁴⁸⁰ Esther Newitt and Victor Stojcevski, 'Mental Health Diversion List' (Evaluation Report, Magistrates Court Tasmania, May 2009) 49.

⁴⁸¹ Offences against justice procedures include: breach of bail and other judicial orders or notices, failure to appear, failure to comply with directions of police officer or resisting a police officer and stating a false name.

⁴⁸² These include: stealing, motor vehicle stealing and making off without payment.

⁴⁸³ These include: driver licence offences, vehicle registration offences, exceeding speed limits offences and exceeding alcohol limits offences.

⁴⁸⁴ Nichole Hunter and Helen McRostie, Helen, 'Magistrates Court Diversion Program, Overview of Key Data Findings' (2001) 20 *Office of Crime Statistics and Research* 1.

V FLRT-UTILIZATION WITHIN THE EXISTING AUSTRALIAN LEGAL CRIMINAL JUSTICE SYSTEM

Impulse-control as such is not ‘treated’ in the current system. Consequently, rehabilitative treatment for impulse-control as an isolated phenomenon does not exist. Clearly, FLRT does not yet exist as a rehabilitative treatment, although it has been established to be concordant with currently accepted offender-rehabilitation models. This thesis accordingly poses the question: If FLRT were to be accredited as a legitimate rehabilitative treatment, through what existing mechanisms could it be administered to offenders?

A review of existing court-mandated opportunities for offender-rehabilitation through mental health diversionary mechanisms and the regular criminal justice system — both in the pre- and post-sentencing stages — in each State and Territory in Australia proceeds on the following conjectural bases:

All definitions of mental illness in each jurisdiction are compatible with the definition of mental disorder as specified in the DSM-5:⁴⁸⁵

a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.⁴⁸⁶

FLRT could be a treatment option under the definition of a ‘prescribed program’⁴⁸⁷ in the Northern Territory, ‘rehabilitation program’⁴⁸⁸ in Australian Capital Territory, ‘other

⁴⁸⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 20.

⁴⁸⁶ Ibid.

⁴⁸⁷ *Sentencing Act 1995* (NT) s 3; *Sentencing Regulations* (NT) reg 2(1)(d).

⁴⁸⁸ *Bail Act 1992* (ACT) s 25(4)(d); *Crimes (Sentencing) Act 2005* (ACT) s 93; *Crimes (Sentencing) Regulations 2006* (ACT) reg 2(1)(c).

programs'⁴⁸⁹ in Queensland, 'community treatment'⁴⁹⁰ and 'intervention program'⁴⁹¹ in New South Wales, a condition of an 'individual support plan',⁴⁹² 'treatment service',⁴⁹³ 'program'⁴⁹⁴ and 'treatment',⁴⁹⁵ in Victoria, 'treatment program'⁴⁹⁶ and 'intervention program'⁴⁹⁷ in South Australia, 'appropriate treatment'⁴⁹⁸ in Western Australia, and 'treatment',⁴⁹⁹ 'rehabilitation'⁵⁰⁰ and 'program'⁵⁰¹ in Tasmania.

For C1 offenders suffering from difficulty with impulse-control in the absence of a mental illness, mechanisms for rehabilitation available through the regular criminal justice system may be appropriate. Mentally ill offenders in C2, C3 or C4, however, would ideally be treated through a mental health diversionary scheme. In some jurisdictions though, no such schemes exist, and so these offenders could only be treated through the regular criminal justice system.

A Existing Offender-Rehabilitation Mechanisms

A review of existing court-mandated opportunities for offender-rehabilitation through mental health diversionary mechanisms and the regular criminal justice system — both in the pre- and post-sentencing stages — in each State and Territory in Australia now follows. Again, this is with a view to locating the possibilities for Australian FLRT-

⁴⁸⁹ *Penalties and Sentencing Act 1992* (Qld) ss 93(1)(d), 94(b), 114(1)(d).

⁴⁹⁰ *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 32, 33.

⁴⁹¹ *Criminal Procedure Act 1986* (NSW) s 347(2)(a).

⁴⁹² Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (2013) <http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Guide_to_Court_Support_and_Diversion_Services.pdf>; *Magistrates' Court Act 1989* (Vic) s 4Y(1).

⁴⁹³ Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (2013) <http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Guide_to_Court_Support_and_Diversion_Services.pdf>.

⁴⁹⁴ *Sentencing Act 1991* (Vic) s 83A.

⁴⁹⁵ *Ibid* ss 48D, 48D(3)(e), 48D(3)(f).

⁴⁹⁶ Sue Dismohamed and Michael Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43; *Criminal Law (Sentencing) Act 1988* (SA) s 10(5).

⁴⁹⁷ *Criminal Law (Sentencing) Act 1988* (SA) s 3.

⁴⁹⁸ *Sentencing Act 1995* (WA) ss 33G(2)(a), 66(2)(a), 73(2)(a), 84A(2)(a).

⁴⁹⁹ *Sentencing Act 1997* (Tas) s 37(2)(d).

⁵⁰⁰ *Ibid* s 59(c).

⁵⁰¹ *Ibid* ss 32, 37(2)(a).

integration within the existing court-mandated opportunities for offender-rehabilitation through mental health diversionary mechanisms as well as the regular criminal justice system.

1 *The Northern Territory*

In the Northern Territory, mental illness is defined legislatively as:

an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur).⁵⁰²

(a) Diversionary Mechanism(s)

No mental health diversion mechanism presently exists in the Northern Territory.⁵⁰³ Thus, for someone suffering from a mental illness, as defined in C2, C3 and C4, there is no mental health diversionary mechanism through which FLRT could be administered.

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

Similarly, no deferred sentencing option exists in the Northern Territory.⁵⁰⁴ Deferred sentencing is a similar power to that of adjournment, whereby the sentencing of an offender is deferred for a period of time, ‘during which the offender may obtain treatment to participate in a range of programs’.⁵⁰⁵ In this period of time, the offender can address his or her offending behaviour, with ‘the likelihood that the court will make a better

⁵⁰² *Criminal Code Act 1983* (NT) s 43A.

⁵⁰³ Australian Institute of Health and Welfare, ‘Diverting Indigenous Offenders from the Criminal Justice System’ (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 6.

⁵⁰⁴ Jelena Popovic, ‘Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable’ (Paper presented at Sentencing Principles, Perspectives and Possibilities Conference, Canberra, Australian Capital Territory, 10–12 February 2006) 8.

⁵⁰⁵ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 203.

decision about the appropriate disposition which may be any of the sentencing options available to it, including a dismissal or a conditional discharge'.⁵⁰⁶

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

Section 9(a) of the *Sentencing Act 1995* (NT) provides 'for the rehabilitation of an offender by allowing the sentence to be served in the community'. Division 4A outlines the imposition of a Community Based Order, whereby s 39F details the court-imposed conditions of such an order. Section 39F(1)(a) states that 'the offender must undertake prescribed programs' and 'submit to medical, psychological or psychiatric assessment and treatment'.⁵⁰⁷

Division 5, Subdivision 2A, of the Act addresses Community Custody Orders whereby, as a statutory condition, the offender must undertake a prescribed program or undergo counselling or treatment.⁵⁰⁸ This counselling or treatment must relate to 'the offender's psychological or psychiatric problem'.⁵⁰⁹ Section 48F details optional conditions available to the court: 'the offender must undertake one, or more than one, specified prescribed programs'.⁵¹⁰

A 'prescribed program' is defined as 'a course, training, education or similar activity prescribed by regulation for the order'.⁵¹¹ Further, 'treatment or counselling addressing personal factors' is a prescribed program.⁵¹² Section 100 also states: 'Where a court may attach a condition to an order or require an offender to give an undertaking, the court may, as a condition of the order or as part of the undertaking, require an offender to undertake a prescribed treatment program'.⁵¹³

⁵⁰⁶ Ibid.

⁵⁰⁷ *Sentencing Act 1995* (NT) s 39F(1)(b)(ii).

⁵⁰⁸ Ibid s 48E(2)(b).

⁵⁰⁹ Ibid s 48E(5)(a).

⁵¹⁰ Ibid s 4F(1)(a).

⁵¹¹ Ibid s 3.

⁵¹² *Sentencing Regulations* (NT) reg 2(1)(d).

⁵¹³ *Sentencing Act 1995* (NT) s 100.

In the Northern Territory, an offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a non-custodial sentence could only have access to FLRT through the aforementioned post-sentencing mechanisms, as no pre-sentence mechanism currently exists.

(d) Regular Criminal Justice System Custodial Rehabilitation Options

The *Prisons (Correctional Services) Act 1980* (NT) provides guidelines and rules concerning medical treatment for offenders serving a term of imprisonment. Treatment programs are possible through these provisions to any prisoner on a consensual basis. The Act does not refer to rehabilitation explicitly.

In the Northern Territory, an offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a custodial sentence could have access to FLRT through the custodial treatment programs.

2 The Australian Capital Territory

In the Australian Capital Territory, mental illness is defined legislatively as:

an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition (a “reactive condition”) resulting from the reaction of a healthy mind to extraordinary external stimuli.⁵¹⁴

(a) Diversionary Mechanism(s)

No mental health diversionary mechanism presently exists in the Australian Capital Territory,⁵¹⁵ and thus for someone suffering from a mental illness, as defined in C2, C3

⁵¹⁴ *Criminal Code 2002* (ACT) s 27(2).

⁵¹⁵ Australian Institute of Health and Welfare, ‘Diverting Indigenous Offenders from the Criminal Justice System’ (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 6.

and C4, there is no mental health diversionary mechanism through which FLRT could be administered.

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

Section 27 of the *Crimes (Sentencing) Act 2005* (ACT) empowers the court to make a Deferred Sentence Order, whereupon being convicted or found guilty an offender is ‘given an opportunity to address his or her criminal behaviour, and anything that has contributed to the behaviour, before the court sentences the offender for the offence’.⁵¹⁶ The court is able to release the offender under s 25 of the *Bail Act 1992* (ACT)⁵¹⁷ with, for example, ‘a requirement that the accused person participate in a program of personal development, training or rehabilitation’.⁵¹⁸

Prior to sentencing, an offender in C1, or a mentally ill offender in C2, C3 or C4, may have access to FLRT through a Deferred Sentence Order.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

One of the objects of the *Crimes (Sentencing) Act 2005* (ACT) is ‘to maximise the opportunity for imposing sentences that are constructively adapted to individual offenders’.⁵¹⁹

A Good Behaviour Order is imposed under s 13 of the Act and may include ‘a rehabilitation program condition’.⁵²⁰ Defined in s 93, a rehabilitation program refers to a program prescribed by regulation.⁵²¹ Regulation 2(1)(c) of the *Crimes (Sentencing) Regulations 2006* (ACT) stipulates that ‘programs that impart self-management and social skills to enable offenders to deal with difficult situations in ways that do not

⁵¹⁶ *Crimes (Sentencing) Act 2005* (ACT) s 27(1)(d).

⁵¹⁷ Part 8.4 of the *Crimes (Sentencing) Act 2005* (ACT) deals with this.

⁵¹⁸ *Bail Act 1992* (ACT) s 25(4)(d).

⁵¹⁹ *Crimes (Sentencing) Act 2005* (ACT) s 6(c).

⁵²⁰ *Ibid* s 13(1)(c).

⁵²¹ *Ibid* s 93.

involve the criminal behaviour’⁵²² constitute rehabilitation programs for the purposes of the *Crimes (Sentencing) Act 2005* (ACT). A Good Behaviour Order made without convicting the offender is known as a Non-Conviction Order.⁵²³

In the Australian Capital Territory, an offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a non-custodial sentence could have access to FLRT through a Good Behaviour Order and/or a Non-Conviction Order.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

One of the main objects of the *Corrections Management Act 2007* (ACT) with respect to the treatment of sentenced offenders is articulated in s 7(1)(d): ‘to promote the offender’s rehabilitation and reintegration into society’. Similarly, the treatment of detainees generally is covered by s 9(f) of the Act: ‘to promote, as far as practicable, the detainee’s rehabilitation and reintegration into society’.⁵²⁴

In the Australian Capital Territory, an offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a custodial sentence could have access to FLRT through the custodial treatment programs.

3 *Queensland*

The *Criminal Code 1899* (Qld) does not contain a specific definition of mental illness. Deferring to the *Mental Health Act 2000* (Qld), a mental illness is defined as ‘a condition characterised by a clinically significant disturbance of thought, mood, perception or memory’.⁵²⁵

⁵²² *Crimes (Sentencing) Regulations 2006* (ACT) reg 2(1)(c).

⁵²³ *Crimes (Sentencing) Act 2005* (ACT) s 17(2).

⁵²⁴ *Corrections Management Act 2007* (ACT) s 9(f).

⁵²⁵ *Mental Health Act 2000* (Qld) s 12.

(a) Diversionary Mechanism(s)

Queensland does not have a mental health diversion court. The Special Circumstances Court, which is no longer in operation, directed participants with ‘impaired decision-making capacity’, including those with a disability attributable to a psychiatric impairment ‘to available treatment, rehabilitation and support services with the focus on reduction of their criminal offending behaviour’.⁵²⁶ This operated under the *Bail (Prescribed Program) Regulations 2006*.

In Queensland, therefore, for someone suffering from a mental illness, as defined in C2, C3 and C4, there is no mental health diversionary mechanism through which FLRT could be administered.

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

Following a finding of guilt, s 19 of the *Penalties and Sentences Act 1992* (Qld) enables the court to release the offender on the condition that the offender must be of good behaviour and ‘the court may impose any additional conditions that it considers appropriate’.⁵²⁷

Prior to sentencing, an offender in C1, or a mentally ill offender in C2, C3 or C4, may have access to FLRT in Qld through the imposition of an ‘additional condition’.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

One of the sentencing guidelines articulated under Part 2 of the Governing Principles in the *Penalties and Sentences Act 1992* (Qld) allows a court, in sentencing, to provide conditions in the court’s order that the court considers will help the offender to be rehabilitated.⁵²⁸

⁵²⁶ T Walsh, ‘Defendants and Criminal Justice Professionals’ Views on the Brisbane Special Circumstances Court’ (2011) 21 *Journal of Judicial Administration* 93, 100.

⁵²⁷ *Penalties and Sentencing Act 1992* (Qld) s 19(2).

⁵²⁸ *Ibid* s 9(1)(b).

A Probation Order may be imposed under s 93 of the Act, whereby the offender ‘must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order’.⁵²⁹ Additional requirements of a Probation Order may include conditions that the court considers necessary: (i) to cause the offender to behave in a way that is acceptable to the community; (ii) to stop the offender from again committing the offence for which the order was made; or (iii) to stop the offender from committing other offences.⁵³⁰

An offender may be subject to an Intensive Corrective Order whereby the offender is to serve the sentence of imprisonment by way of intensive correction in the community and not in a prison.⁵³¹ A general requirement of such an order is that the offender ‘must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer’.⁵³²

In Queensland, therefore, an offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a non-custodial sentence could have access to FLRT through a Probation Order or an Intensive Corrective Order.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

The *Corrective Services Act 2000* (Qld), s 266(1)(d), specifically gives directions to the Chief Executive Officer to provide services or programs to help rehabilitate offenders.

An offender in C1, or a mentally ill offender in C2, C3 or C4, receiving a custodial sentence, could thus have access to FLRT in Queensland through the stipulated offender programs.

⁵²⁹ Ibid s 93(1)(d).

⁵³⁰ Ibid s 94(b).

⁵³¹ Ibid s 113(1).

⁵³² Ibid s 114(1)(d).

4 New South Wales

The *Mental Health Act 2007* (NSW), s 4, defines mental illness as

a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms: (a) delusions, (b) hallucinations, (c) serious disorder of thought form, (d) a severe disturbance of mood, (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).

(a) *Diversionary Mechanism(s)*

Two types of diversionary mechanisms exist in New South Wales. Diversion is available through legislative powers and also through a Statewide Community and Court Liaison Service.

(i) *Diversionary Legislation in New South Wales*

In New South Wales, magistrates have been provided with unique legislative powers under ss 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to divert offenders with mental illnesses, such as those defined in C2, C3 and C4, or intellectual disabilities charged with summary offences and minor indictable offences from the criminal justice system into community treatment (of which FLRT could be a part). Established in 2002, the service diverts offenders at any point of the court process into mental health treatment.⁵³³

Diversion on adjournment of proceedings occurs where a defendant appears to the court to be developmentally disabled or suffering from mental illness or suffering from a mental condition for which treatment is available in a mental health facility. The defendant may be granted bail and the magistrate may make any order that he or she thinks appropriate.⁵³⁴ Section 32(3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) enables a magistrate to dismiss the charge and discharge the offender unconditionally or into the care of a responsible person or on the condition that the

⁵³³ Jacqueline Joudo, 'Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs' (Research and Public Policy Series No 88, Australian Institute of Criminology, 2008) 53.

⁵³⁴ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 203.

offender attend on a person or at a place specified by the magistrate for assessment of the offender's mental condition or for treatment.

Importantly, in exercising discretion to grant orders under s 32 of the Act, the court must be confident that a treatment service is available.⁵³⁵ In achieving this, a treatment plan is provided to the court by a service provider before an order is granted.

Magistrates also have power under s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to order that individuals with a mental illness be taken to a mental health facility for assessment and detention, or to a mental health facility for assessment and detention, and if the offender is found on assessment not to be a person with a mental illness or disorder, the person may be brought back before a magistrate or an authorized officer, or be discharged, unconditionally or subject to conditions, into the care of a responsible person.

Sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) provide an example of powers of diversion being incorporated into the mainstream system without the need to refer a person to a specific list.

(ii) *NSW Statewide Community and Court Liaison Service (SCCLS)*

Established in 1999, the SCCLS assists magistrates in utilizing the diversionary legislation under the *Mental Health (Forensic Provisions) Act 1990* (NSW).

The SCCLS is part of the Statewide Forensic Mental Health Directorate and is entirely under the jurisdiction of Justice Health. The management structure of the service comprises a clinical director, an operations manager, a consulting forensic psychiatrist, an administrative officer, and includes reporting relationships to the Director of Statewide Forensic Mental Health Services. At each court where SCCLS services are available, a

⁵³⁵ *DPP v Albion* 2000 NSWSC 896.

court liaison officer (mental health nurse/clinical nurse consultant) provides service to the court under the supervision of consulting psychiatric personnel.⁵³⁶

The SCCLS is a court-based diversion program targeting individuals in the criminal justice system who are ‘mentally ill and mentally disordered’.⁵³⁷ The service is available after the process of prosecution has begun for individuals charged with non-indictable offences. Broadly, the service provides mental health assessments and reports to the court to assist magistrates in making informed decisions about cases involving those with mental health problems.⁵³⁸

The SCCLS diversion process comprises three phases: the screening and identification of individuals suspected of having a mental illness or mental disorder; psychiatric assessment and triage by a mental health professional of persons identified in the screening phase; and diversion, if appropriate, in negotiation and consultation with court staff and relevant health services.⁵³⁹

In identifying possible cases for mental health assessment, the court liaison officers screen all detainees at court through daily review of police facts sheets, DCS documents and any other available relevant information.⁵⁴⁰ In the assessment phase, psychiatric interviews are conducted with the informed written consent of all individuals.

Following assessments, a court report providing impartial views on mental health matters and making recommendations is presented to the court. If the court deems diversion to mental health facilities in the community appropriate, the court liaison officers communicate with the appropriate services and provide relevant information to assist

⁵³⁶ D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual* (NSW Justice Health, 2008).

⁵³⁷ Ibid 6.

⁵³⁸ Deborah Bradford and Nadine Smith, ‘An Evaluation of the NSW Court Liaison Services’ (NSW Bureau of Crime Statistics and Research, 2009) 7.

⁵³⁹ D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual* (NSW Justice Health, 2008); Greenberg, D and B Nielsen, ‘Court Diversion in NSW for People with Mental Health Problems and Disorders’ (2002) 13 *NSW Public Health Bulletin* 158.

⁵⁴⁰ D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual* (NSW Justice Health, 2008).

with the integration of individuals into treatment. When the court does not consider community diversion appropriate, the court liaison officers can facilitate access to appropriate care in custodial settings.⁵⁴¹ The SCCLS has no ongoing clinical management or supervision role for individuals once diverted from court into the mental health system.⁵⁴²

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

One of the purposes of sentencing explicated in s 3A(d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is ‘to promote the rehabilitation of the offender’.

The *Criminal Procedure Act 1986* (NSW) provides for the recognition and operation of certain programs for dealing with accused persons and offenders, known as ‘intervention programs’. The provisions are found in Chapter 7, Part 4 of the Act. An accused person or offender, such as one in C1, may have access to FLRT through referral for participation in an intervention program at several points during criminal proceedings.

Prior to a conviction or a finding of guilt, s 350 of the *Criminal Procedure Act* empowers the court to adjourn proceedings to allow an accused person to be assessed or to participate in an intervention program.

In accordance with the *Criminal Procedure Act 1986*, an intervention program may include a program ‘promoting the treatment or rehabilitation of offenders or accused persons’.⁵⁴³ An intervention plan is ‘a plan, agreement or arrangement arising out of the participation of an offender or an accused person in an intervention program’.⁵⁴⁴

⁵⁴¹ D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual* (NSW Justice Health, 2008); Greenberg, D and B Nielsen, ‘Court Diversion in NSW for People with Mental Health Problems and Disorders’ (2002) 13 NSW Public Health Bulletin 158.

⁵⁴² D Greenberg, *NSW Statewide Community and Court Liaison Service Program Manual*, (NSW Justice Health, 2008).

⁵⁴³ *Criminal Procedure Act 1986* (NSW) s 347(2)(a).

⁵⁴⁴ *Ibid* s 346(1).

In addition, without proceeding to conviction, a court that finds a person guilty of an offence may make an order requiring the person to participate in an intervention program (and to comply with any plan arising out of the program) under s 10(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This is an Intervention Program Order, the procedures for which are set out in Part 8C of the *Crimes (Sentencing Procedure) Act*. Intervention Program Orders are made ‘to reduce the likelihood of the person committing further offences by inviting or requiring him or her to participate in a rehabilitation treatment or restorative justice program’.⁵⁴⁵

Section 11 of the *Crimes (Sentencing) Procedure Act* enables deferral of sentencing for rehabilitation, participation in an intervention program, or other purposes. A court that finds a person guilty of an offence (whether or not it proceeds to conviction) may make an order adjourning proceedings for the purpose of assessing the offender’s capacity and prospects for rehabilitation,⁵⁴⁶ or for the purpose of allowing the offender to demonstrate that rehabilitation has taken place,⁵⁴⁷ or for the purpose of assessing the offender’s capacity and prospects for participation in an intervention program,⁵⁴⁸ or for the purpose of allowing the offender to participate in an intervention program.⁵⁴⁹

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

Under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), instead of imposing a sentence of imprisonment on a C1 offender, a court may make an order directing the offender to enter into a good behaviour bond for a specified term.

A court can make participation in an intervention program (and compliance with any plan arising out of the program) a condition of a good behaviour bond under s 9 of the Act

⁵⁴⁵ A Freiberg and N Morgan, ‘Between Bail and Sentence: The Conflation of Dispositional Options’ (2004) 15 *Current Issues in Criminal Justice* 220.

⁵⁴⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(a).

⁵⁴⁷ *Ibid* s 11(b).

⁵⁴⁸ *Ibid* s 11(b1).

⁵⁴⁹ *Ibid* s 11 (b2); See also *R v Trindall* (2002) 133 A Crim R 119.

(explicated under s 95A), or of a suspended sentence under s 12 of the Act, FLRT could be one of the treatments.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

An object of the *Crimes (Administration of Sentences) Act 1999* (NSW) is to provide for the rehabilitation of offenders with a view to their reintegration into the general community.⁵⁵⁰ An offender in C1 receiving a custodial sentence could have access to FLRT through the stipulated offender programs. Despite the mental health diversionary mechanisms available in New South Wales, should a mentally ill offender in C2, C3 and C4 be sentenced to a term of imprisonment, FLRT could similarly be available.

5 *Victoria*

The *Magistrates' Court Act 1989* (Vic) defers to the definition of mental illness in the *Mental Health Act 2014* (Vic) as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'.⁵⁵¹

(a) Diversionary Mechanism(s)

Victoria has two types of diversionary mechanisms. One is a separate court list called the Assessment and Referral Court List, and the other is the Mental Health Court Liaison Service.

(i) Assessment and Referral Court (ARC) List

This is a specialist court list developed by the Department of Justice and is established under s 4S of the *Magistrates' Court Act 1989* (Vic) to meet the needs of accused persons who have a mental illness and/or a cognitive impairment. Pursuant to s 4T of the Act, an accused, such as those defined in C2, C3 and C4, is eligible to participate in the ARC List

⁵⁵⁰ *Crimes (Administration of Sentences) Act 1999* (NSW) s 2A(1)(d).

⁵⁵¹ *Mental Health Act 2014* (Vic) s 4(1).

if he or she is suffering from mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, or a neurological impairment, including, but not limited to, dementia. Offences of a violent, serious violent or serious sexual nature are precluded from the list.⁵⁵² Less serious offences that may typically be listed include recklessly causing *serious injury*, making threats to kill, and indecent assault.

The ARC List is located at Melbourne Magistrates' Court and works collaboratively with the Court Integrated Services Program (CISP), which provides participants with case management. This may include referral for psychological assessment (which may include referral to FLRT), welfare, health, mental health, disability, housing services and drug and alcohol treatment.⁵⁵³ The accused must consent to participate in the ARC List, although a plea of guilty is not required.

Once a referral is made and an initial assessment is administered, the ARC List Magistrate will decide whether to accept the participant in the ARC List. If the referral is accepted, the ARC List clinical advisor will develop an individual support plan (ISP) in collaboration with the participant and the CISP staff for approval by the Magistrate. If the referral is not accepted, the accused's charges will be referred back to mainstream court lists. If the participant pleads not guilty, his or her case will be returned to mainstream court for a contested hearing.

Upon completion of an ISP to the satisfaction of the court, the court must hear and determine the criminal proceeding to which the ISP related.⁵⁵⁴ If an accused completes, or participates in, an ISP to the satisfaction of the court, the court may discharge the accused without any finding of guilt.⁵⁵⁵ If an accused participates in an ISP to the satisfaction of the court and the accused is subsequently found guilty of the charge, the court must take into account the extent to which the accused participated in the ISP when sentencing the

⁵⁵² See, eg, *Sentencing Act 1991* (Vic) s 6B(1); sch 1 ss 1, 2, 3.

⁵⁵³ Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (2013) <http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Guide_to_Court_Support_and_Diversion_Services.pdf>.

⁵⁵⁴ *Magistrates' Court Act 1989* (Vic) s 4Y(1).

⁵⁵⁵ *Ibid* s 4Y(2).

accused.⁵⁵⁶ However, if an accused fails to participate in an ISP to the satisfaction of the court and the accused is subsequently found guilty of the charge, the court must not take into account the accused's failure to participate in the ISP when sentencing the accused.⁵⁵⁷

(ii) *Mental Health Court Liaison Service (MHCLS)*

A court-based assessment and advice service, the MHLS was implemented in 1994 as a pilot program and has since been expanded across the State. The program aims to reduce recidivism in mentally ill offenders, such as those defined in C2, C3 or C4, by diverting them into mental health treatment services. The service identifies and assesses people before the Magistrates' Court who may suffer from mental illness, and facilitates access to appropriate treatment services (which may include referral to FLRT if it were a possibility). The service also operates in five rural Magistrates' Courts.⁵⁵⁸

Once the MHCLS receives a referral it will ensure that the offender receives appropriate medication and that other custodial management issues are addressed.⁵⁵⁹ Mental health clinicians undertake clinical assessments in order to determine the presence or absence of serious mental illness, and provide feedback based on these assessments to the court.⁵⁶⁰

(b) *Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)*

Pursuant to s 83A of the *Sentencing Act 1991* (Vic), if a person is found guilty of an offence and the court is of the opinion that sentencing should, in the interests of the offender, be deferred, and the offender agrees, the court may defer sentencing to allow

⁵⁵⁶ Ibid s 4Y(5).

⁵⁵⁷ Ibid s 4Y(6).

⁵⁵⁸ Jacqueline Joudo, 'Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs' (Research and Public Policy Series No 88, Australian Institute of Criminology, 2008) 53.

⁵⁵⁹ Court Support and Diversion Services, *Guide to Specialist Courts and Court Support Services* (2013) Magistrates' Court of Victoria
<http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Guide_to_Court_Support_and_Diversion_Services.pdf>.

⁵⁶⁰ Ibid.

the offender's capacity for and prospects of rehabilitation to be assessed, to demonstrate that rehabilitation has taken place, or to participate in a program or programs aimed at addressing the underlying causes of the offending. This would be appropriate for an offender in C1, with such a program including FLRT.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

One of the enumerated purposes of the *Sentencing Act 1991* (Vic) is 'to prevent crime and promote respect for the law by providing for sentences that facilitate the rehabilitation of offenders'.⁵⁶¹

A Community Correction Order provides 'a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'.⁵⁶² A court that is making a Community Correction Order may attach a condition to the order that requires the offender to undergo 'treatment and rehabilitation'.⁵⁶³ The treatment and rehabilitation specified may be 'any mental health assessment and treatment that may include psychological, neuropsychological, psychiatric or treatment in a hospital or residential facility',⁵⁶⁴ and more broadly 'any program that addresses factors related to his or her offending behaviour'.⁵⁶⁵

An order made under Division 1 of the *Sentencing Act* (Dismissals, discharges and adjournments) may serve the purpose 'to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised'.⁵⁶⁶ Options exist for release on adjournment following conviction,⁵⁶⁷ or without conviction,⁵⁶⁸ with a treatment and rehabilitation condition. This would be appropriate for an offender in C1,

⁵⁶¹ *Sentencing Act 1991* (Vic) s 1(d)(ii).

⁵⁶² *Ibid* s 36(1).

⁵⁶³ *Ibid* s 48D.

⁵⁶⁴ *Ibid* s 48D(3)(e).

⁵⁶⁵ *Ibid* s 48D(3)(f).

⁵⁶⁶ *Ibid* s 70(1)(a).

⁵⁶⁷ *Ibid* s 72.

⁵⁶⁸ *Ibid* s 75.

with such a program including FLRT if it were to be an available option in the jurisdiction.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

Section 5(1)(c) of the *Sentencing Act 1991* (Vic) states that one of the purposes for which sentences may be imposed is to ‘establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated’. The *Corrections Act* and *Regulations* make few references to rehabilitative programs and purposes. Section 57B of the *Corrections Act 1986* (Vic) refers to the rehabilitation and transition permit system. An offender in C1 receiving a custodial sentence would have access to FLRT through the stipulated offender programs. Despite the mental health diversionary mechanisms available in Victoria, should a mentally ill offender in C2, C3 or C4 be sentenced to a term of imprisonment, FLRT would similarly be available.

6 *South Australia*

In South Australia, mental illness is legislatively defined as ‘a pathological infirmity of the mind (including a temporary one of short duration)’.⁵⁶⁹ Mental impairment includes a mental illness, an intellectual disability and a disability or impairment of the mind resulting from senility.⁵⁷⁰

(a) Diversionary Mechanism(s)

In South Australia, the Magistrates’ Court Diversion Program (MCDP) has been in operation since 1999 and was Australia’s first specialized court for people with mental impairments.⁵⁷¹ The program was established following a review of amendments to the

⁵⁶⁹ *Criminal Law Consolidation Act 1934* (SA) s 269A(1).

⁵⁷⁰ *Ibid.*

⁵⁷¹ Nichole Hunter and Helen McRostie, Helen, ‘Magistrates Court Diversion Program, Overview of Key Data Findings’ (2001) 20 *Office of Crime Statistics and Research* 1.

State's mental health legislation, which had resulted in growing numbers of people relying on the costly and resource-intensive defence of mental illness for minor charges.

The program, which usually runs for six months,⁵⁷² is open to people with a mental illness — such as those defined in C2, C3 and C4 — an intellectual disability, a brain injury, dementia or a personality disorder who commit summary and certain minor indictable offences.⁵⁷³ The program has taken a flexible approach to eligibility regarding the types of offences involved and considers referrals on a case-by-case approach, with an emphasis on minor offences.⁵⁷⁴ There must be a connection between the mental impairment and the offending behavior, such that a link can be reasonably drawn. Otherwise, it is opined, if there is no connection the intervention will have no impact on future offending. Participation in the program is voluntary and, although defendants are not required to enter a guilty plea, they must indicate that they will not contest the charges against them.⁵⁷⁵ The MCDP has a dedicated court team, comprising a designated magistrate and a number of court officers — a program manager, four clinical advisors and five clinical liaison officers who develop a personalised treatment plan for each defendant.⁵⁷⁶ Regular status meetings are held where the defendant's compliance with their individual intervention plan is assessed. Failure to comply might result in extension, alteration or termination of the program.⁵⁷⁷

A Clinical Advisor (registered psychologist) must be satisfied at the preliminary assessment that the person understands the program and consents to being involved. A written report is provided to the Magistrate who decides whether to accept the person into the program. Program participants can generally expect a reduction in the sentence they

⁵⁷² E Richardson and B McSherry, 'Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry* 249, 250.

⁵⁷³ Nichole Hunter and Helen McRostie, Helen, 'Magistrates Court Diversion Program, Overview of Key Data Findings' (2001) 20 *Office of Crime Statistics and Research* 1, 4.

⁵⁷⁴ M Burvill et al, 'The Management of Mentally Impaired Offenders within the South Australian Criminal Justice System' (2003) 26 *International Journal of Law and Psychiatry* 13, 23.

⁵⁷⁵ Ibid.

⁵⁷⁶ Courts Administration Authority (SA), *Magistrates Court Diversion Program* <www.courts.sa.gov.au/courts/magistrates/index.html>.

⁵⁷⁷ Nichole Hunter and Helen McRostie, Helen, 'Magistrates Court Diversion Program, Overview of Key Data Findings' (2001) 20 *Office of Crime Statistics and Research* 1, 4.

would have received in the general court list.⁵⁷⁸ The ongoing monitoring of the offender enables the treatment plan to be reviewed and updated where necessary. If it appears that the Diversion Program is not suitable, then participation may be terminated and the person returned to the normal court list or sentenced by the Diversion Program Magistrate. Poor performance and lack of satisfactory progress on the program is not relevant to sentencing.

The team of Clinical Liaison Officers is responsible for the implementation of the treatment plans. This includes linking Diversion Program participants with relevant services and maintaining ties with service providers to promote the aims of the program and assist access to the services they provide. The Diversion Program facilitates the involvement of service providers based in the community, who are responsible for the case management of the offender on the particular treatment program.⁵⁷⁹ One such treatment program could be FLRT. Progress in the Diversion Program is assessed in relation to the individual's overall mental well-being.⁵⁸⁰

(i) *Sentencing in MCDP*

An intervention program is defined in s 3 of the *Criminal Law (Sentencing) Act 1988* (SA) as a program that provides: (a) supervised treatment; (b) supervised rehabilitation; (c) supervised behaviour management; (d) supervised access to support services; or (e) a combination of any one or more of the above. The specific sentencing considerations afforded to mentally impaired offenders involved in an intervention program are addressed in turn.

⁵⁷⁸ Sue Dismohamed and Michael Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41; *Criminal Law (Sentencing) Act 1988* (SA) s 10(5).

⁵⁷⁹ Sue Dismohamed and Michael Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.

⁵⁸⁰ M Burvill et al, 'The Management of Mentally Impaired Offenders within the South Australian Criminal Justice System' (2003) 26 *International Journal of Law and Psychiatry* 13, 28.

(ii) *Without Conviction or Penalty*

The *Criminal Law (Sentencing) Act 1988* (SA), s 19C(1), empowers a court to release a defendant who has been found guilty of a summary or minor indictable offence without conviction and without penalty where the court is satisfied that: the defendant suffers from a mental impairment that explains and extenuates, at least to some extent, the conduct that constitutes the elements of the offence;⁵⁸¹ the defendant has completed or is participating in a satisfactory manner in an intervention program;⁵⁸² the defendant recognizes that he or she suffers from the mental impairment and is making a conscientious attempt to overcome the associated behavioural problems;⁵⁸³ and release of the defendant does not pose an unacceptable risk to the safety of a particular person or the community.⁵⁸⁴

(iii) *Dismissal of the Charge*

Section 19C(2) of the *Criminal Law (Sentencing) Act 1988* (SA) empowers a court to dismiss a charge of a summary or minor indictable offence without any plea being entered (such as where the matter has not been ‘finally determined’), where the court is satisfied that the same conditions are met as in s 19C(1)(a)–(b). The dismissal of a charge is a favourable option to those who have completed, or participated to a satisfactory extent, in an intervention program⁵⁸⁵ through the MCDP: they have received rehabilitative treatment, yet are absolved of the criminality of their actions.

(iv) *Release on Undertaking to Complete the Program*

In accordance with s 19C(3) of the *Criminal Law (Sentencing) Act 1988* (SA), where a defendant is participating in an intervention program but has not yet completed the program, a court may, instead of releasing the defendant under s 19C(2), release the

⁵⁸¹ *Criminal Law (Sentencing) Act 1988* (SA) s 19C(1)(a)(i); See also *Dokowicz v Police* [2008] SASC 154.

⁵⁸² *Criminal Law (Sentencing) Act 1988* (SA) s 19C(1)(a)(ii).

⁵⁸³ *Ibid* s 19C(1)(a)(iii).

⁵⁸⁴ *Ibid* s 19C(1)(b).

⁵⁸⁵ *Ibid* s 19C(2)(a)(ii).

defendant on an undertaking that they will complete the program and then appear before the court for determination, or appear before the court for determination if they fail to complete the program.

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

Section 10 of the *Criminal Law (Sentencing) Act 1988* (SA) outlines the sentencing considerations, one of which is ‘the rehabilitation of the defendant’.⁵⁸⁶ Section 19B of the Act empowers the court, on finding a person guilty of an offence (whether it proceeds to conviction), to make an order adjourning proceedings to a specified date and granting bail to the defendant in accordance with the *Bail Act 1985* (SA) ‘for the purpose of allowing the defendant to participate in an intervention program’.⁵⁸⁷ This would be appropriate for an offender in C1, with such a program including FLRT if it were to be an available option for the court.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

Section 38 of the *Criminal Law (Sentencing) Act 1988* (SA) provides for suspension of imprisonment on entering a bond. A Good Behaviour Bond with a condition to undertake an intervention program⁵⁸⁸ is an example. Similarly, s 39 of the Act enables an offender to be discharged without sentence on entering into a Good Behaviour Bond with a condition to undertake an intervention program.⁵⁸⁹ Such options would be appropriate for an offender in C1, with such a program including FLRT.

⁵⁸⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m).

⁵⁸⁷ *Ibid* s 19B(1)(d).

⁵⁸⁸ *Ibid* s 42(1)(da).

⁵⁸⁹ *Ibid*.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

The Department for Correctional Services offender-rehabilitation program operates in accordance with the *Correctional Services Act 1982* (SA), s 23, which relates to prisoner assessment. In s 23(3)(i) it is stated that in carrying out an assessment under the section, the Chief Executive Officer must have regard to any proposed plans in respect of the release of the prisoner and his or her social rehabilitation.

The Department for Correctional Services ensures that offenders and prisoners with an assessed need will be provided with a range of targeted programs and services that will assist them in developing appropriate social and vocational skills to prevent reoffending. An offender in C1 receiving a custodial sentence would have access to FLRT through the stipulated offender programs. Despite the mental health diversionary mechanisms available in South Australia, should a mentally ill offender in C2, C3 or C4 be sentenced to a term of imprisonment, FLRT would be similarly be available.

7 Western Australia

In Western Australia, a person has a ‘mental illness’ if he or she suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgement or behaviour to a significant extent.⁵⁹⁰ The term mental illness means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but it does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli. The term ‘mental impairment’ means intellectual disability, mental illness, brain damage or senility.⁵⁹¹

⁵⁹⁰ *Mental Health Act 1996* (WA) s 4(1).

⁵⁹¹ *Criminal Code Act Compilation Act 1913* (WA) Appendix B.

(a) *Diversionary Mechanism(s)*

The Specialist Treatment and Assessment Referral Team (START) Court commenced operation in March 2013. This pilot program is the first mental health court diversion program in Western Australia to ensure that those with mental health issues who need help receive it.⁵⁹² Conceivably, offenders such as those defined in C2, C3 or C4 may be able to receive FLRT if available under the auspices of START.

The initiative operates out of the Perth Magistrates' Court and convenes five days per week. It focuses on providing greater options for people in court with mental illness, and increasing the capacity of the court to respond in ways that support people while addressing their offending behaviour.⁵⁹³

The START Court operates without specific legislative backing, with the primary legislative vehicle for the operation of the court being the granting of conditional bail under the provisions of the *Bail Act 1982* (WA).

Those charged with serious offending, or who are considered to pose a high risk to the community, are not ordinarily admitted into the program. Entry to the program is not conditional upon a plea of guilty, because in many instances the program will be applied prior to entry of the plea. Those with a primary diagnosis of intellectual disability, drug misuse, or personality disorder are not admitted into the program.

Western Australia has a pre-existing diversion program for offenders with intellectual disabilities. The Intellectual Disability Diversion Program is open to adults with a diagnosed intellectual disability, who have been charged with minor non-violent offences. Those adults who do not agree with the referral, or for whom a disability is not detected continue with the traditional court process. For those deemed eligible, the Magistrate adjourns the matter for a plan to be developed. Progress reports are provided

⁵⁹² Magistrates Court of Western Australia, *Start Court* (2015)
<http://www.magistratescourt.wa.gov.au/S/start_court.aspx?uid=1798-2813-8239-9839>.

⁵⁹³ Ibid.

to the court. If a person does not comply with the plan, he or she continue through the traditional court process. Where an intervention plan is successfully completed, the matter is finalized, with participants receiving a reduced sentence and a certificate of participation.⁵⁹⁴

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

Sections 33A–K of the *Sentencing Act 1995* (WA) deal with Pre-Sentence Orders (PSO). If a court is sentencing an offender for one or more imprisonable offences, the court may make a PSO in respect of the offender if it considers ‘that a PSO would allow the offender to address his or her criminal behaviour and any factors which contributed to the behaviour’,⁵⁹⁵ and ‘that if the offender were to comply with a PSO the court might not impose a term of imprisonment’.⁵⁹⁶

The program requirement of the PSO is addressed under section 33G and may include ‘undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment’.⁵⁹⁷ This would be appropriate for an offender in C1, with such a program including FLRT.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

Neither the *Sentencing Act 1995* (WA) nor the *Sentence Administration Act 2003* (WA) explicitly mentions rehabilitation as an objective of sentencing.

A Conditional Release Order (CRO) enables the court to ‘impose any requirements on the offender it decides are necessary to secure the good behaviour of the offender’.⁵⁹⁸ The program requirement of the imposition of a Community Based Order (CBO) is addressed

⁵⁹⁴ Jacqueline Joudo, ‘Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs’ (Research and Public Policy Series No 88, Australian Institute of Criminology, 2008) 53.

⁵⁹⁵ *Sentencing Act 1995* (WA) s 33A(3)(b).

⁵⁹⁶ *Ibid* s 33A(3)(c).

⁵⁹⁷ *Ibid* s 33G(2)(a).

⁵⁹⁸ *Ibid* s 49(1).

under s 66 of the Act. This may include ‘undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment’.⁵⁹⁹

The program requirement of the imposition of an Intensive Corrections Order (ICO) is addressed under s 73 of the Act and may include ‘undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment’.⁶⁰⁰

Section 84A of the Act stipulates the program requirement of the imposition of a Conditional Suspended Sentence (CSI). This may include ‘undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment’.⁶⁰¹ Under the program requirements of any of these abovementioned orders, FLRT could be administered to an offender in C1.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

The ‘Preparation and Implementation of Activity Programs’ under s 95 of the *Prisons Act 1981* (WA) enables ‘the provision of services and programs for the well-being and rehabilitation of prisoners’.⁶⁰²

An offender in C1 receiving a custodial sentence would have access to FLRT through the stipulated offender programs. Despite the mental health diversionary mechanisms available in Western Australia, should a mentally ill offender in C2, C3 or C4 be sentenced to a term of imprisonment, FLRT would be similarly available.

⁵⁹⁹ Ibid s 66(2)(a).

⁶⁰⁰ Ibid s 73(2)(a).

⁶⁰¹ Ibid s 84A(2)(a).

⁶⁰² *Prisons Act 1981* (WA) s 95.

8 Tasmania

In Tasmania, mental illness is defined as ‘a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent’.⁶⁰³

(a) *Diversionary Mechanism(s)*

Tasmania’s Mental Health Diversion List (MHDL) was established in 2007 and operates within the Hobart and Launceston registries of the Magistrates Court. The MHDL is not a separate or distinct court and is not subject to any unique legislation; it utilizes existing provisions in the *Bail Act 1994* (Tas) and the *Sentencing Act 1997* (Tas) to divert offenders into treatment.⁶⁰⁴ The List is open to defendants who have impaired intellectual or mental functioning as a result of a mental illness, such as those defined in C2, C3 and C4. People with intellectual disabilities will only be accepted if they also have a mental illness.

The list is open to people charged with summary offences, or indictable offences triable summarily, with the exception of sexual offences and some offences involving bodily harm.⁶⁰⁵ Participation is voluntary and the person must consent to be referred from the general court list. The person is not required to give a formal plea of guilty before participating.

Once consent is given to participation in the program, an assessment is conducted by the Forensic Mental Health Court Liaison Officer to determine whether the person has impaired intellectual or mental functioning as a result of a mental illness. An eligible person will then appear before the Diversion List Magistrate who decides whether to accept the person into the program. An offender accepted onto the Hobart Diversion List then undergoes a full assessment and is assisted to access treatment (of which FLRT may be an example) and services in the community by the Forensic Mental Health Court

⁶⁰³ *Mental Health Act 1996* (Tas) s 4.

⁶⁰⁴ Magistrates Court Tasmania, *Mental Health Diversion List Procedural Manual* (April 2007).

⁶⁰⁵ *Ibid* 7.

Liaison Officer via a detailed treatment plan.⁶⁰⁶ Those offenders who are found not eligible to participate are referred back to the general list.

The offender must comply with a personalised treatment plan and attend court on a regular (usually monthly) basis to discuss their progress. Compliance may be met with verbal encouragement, adjustments to the treatment/supervision plan, conferral of other rewards, or graduation. Non-compliance may be met with verbal sanctions, adjustments to the treatment/supervision plan, or expulsion from the program.⁶⁰⁷ If the person is excluded from the Hobart Diversion List, the matter reverts back to the general court list.

The Forensic Mental Health Court Liaison Officer provides a verbal report to the Diversion List Magistrate at the final review, detailing the offender's involvement and progress on the program. The Magistrate takes this report into account when finalizing the matter, which may result in the criminal charges being withdrawn if the offender has successfully completed the program.

(b) Regular Criminal Justice System Pre-Sentence Rehabilitation Option(s)

One of the stated purposes of the *Sentencing Act 1997* (Tas) is to 'help prevent crime and promote respect for the law by allowing courts to ... impose sentences aimed at the rehabilitation of offenders'.⁶⁰⁸

Section 7(f) of the Act empowers the court, on finding a person guilty of an offence, 'with or without recording a conviction, adjourn the proceedings ... on the offender giving an undertaking with conditions attached, order the release of the offender'.⁶⁰⁹ An undertaking under s 7(f) is subject to the condition that the offender must be of good behaviour,⁶¹⁰ and the offender must also observe any additional conditions imposed by

⁶⁰⁶ Ibid 9

⁶⁰⁷ Ibid 17.

⁶⁰⁸ *Sentencing Act 1997* (Tas) s 3(e)(ii).

⁶⁰⁹ Ibid s 7(f).

⁶¹⁰ Ibid s 59(b).

the court.⁶¹¹ One such condition might be participation in a rehabilitation program, which would be appropriate for an offender in C1, with such a program including FLRT if possible.

(c) Regular Criminal Justice System Post-Sentence Rehabilitation Option(s)

A suspended sentence under s 24 of the *Sentencing Act 1997* (Tas) suspending the whole or a part of a sentence of imprisonment may be subject to a condition that the offender is required to undertake a rehabilitation program.⁶¹² (Under s 4 of the Act, ‘rehabilitation program’ means a structured treatment program designed to reduce the likelihood of a person who has committed a family violence offence reoffending.)

An offender who is subject to a Community Service Order may be directed to attend ‘an educational or other program in accordance with the directions of a probation officer’.⁶¹³ Subject to s 37(2) of the Act, a probation order may include a special condition that ‘the offender must attend educational and other programs as directed by the court or a probation officer’,⁶¹⁴ and that ‘the offender must submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer’.⁶¹⁵

These post-sentence rehabilitation options would be appropriate for an offender in C1, with FLRT as an available treatment.

(d) Regular Criminal Justice System Custodial Rehabilitation Option(s)

The *Corrections Act 1997* (Tas) contains no direction regarding rehabilitation or programs. An offender in C1 receiving a custodial sentence would have access to FLRT through the stipulated offender programs. Despite the mental health diversionary

⁶¹¹ Ibid s 59(c).

⁶¹² Ibid s 24(2)(c).

⁶¹³ Ibid s 32.

⁶¹⁴ Ibid s 37(2)(a).

⁶¹⁵ Ibid s 37(2)(d).

mechanisms available in Tasmania, should a mentally ill offender in C2, C3 or C4 be sentenced to a term of imprisonment, FLRT would similarly be available.

VI CONCLUSION

As evidenced by the preceding overview, there appears to be little consistency in the legislative fiats that drive the delivery of rehabilitative services. It is difficult to identify a cohesive legislative commitment to rehabilitative ideals in Australia and, instead, where it exists, legislation appears to be fragmented. For the most part, the imprimatur for programs is located in legislation, but there is no consistency in rubrics. Sometimes the legislation is focused on corrections, sometimes on sentencing, and sometimes on parole or programs or courts administration. Moreover, the mandate for delivery derives principally from departmental administrative initiatives, which vary according to location.

Parliamentary authority for the delivery of correctional services across the nation differs markedly from jurisdiction to jurisdiction. Sometimes it appears in the relevant criminal statutes, sometimes in correctional legislation, and sometimes in the various Acts related to sentencing that apply in some, but not all, jurisdictions. Not only are there different legislative approaches to correctional authority and direction, there are a variety of models for delivery of programs as well. These models range from the passive legislative model, to the specific legislative mandate model. Some jurisdictions provide a very general administrative fiat, with policy specifics left principally to departmental development and implementation. Others operate within a more directive regime.⁶¹⁶

Despite the varied options for offender-rehabilitation within the States and Territories in Australia, this chapter has established the plausibility of FLRT-utilization within the

⁶¹⁶ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 4.

existing rehabilitative mechanisms. The following chapter examines the diversification of the therapeutic practice of FLRT by widening the ambit of existing mechanisms. The utility of FLRT as part of court-mandated rehabilitative treatment, rather than full diversion, for major indictable offences in superior courts is advocated. The use of FLRT in tribunals and the extension of FLRT to other diversionary schemes, as well as in the rehabilitation of youth offenders and FLRT-incorporation in adult custodial programs and post-release programs are also advanced.

Before progressing to Chapter 5, the existing court-mandated opportunities for offender-rehabilitation through Australian mental health diversionary mechanisms and the regular criminal justice system, as detailed above, are summarized in the following table. Offenders classified according to the categories of impulse-control (C1, C2, C3 and C4) are depicted in shaded text within the table, according to appropriate dispositional mechanisms.

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
Northern Territory	—	—	<p><i>Sentencing Act 1995</i> (NT)</p> <p>s 9(a) Rehabilitation of offender by sentence served in community</p> <p>s 39A Community Based Order</p> <p>s 48A Community Custody Order</p> <p>s 100 Condition of order to undertake treatment program</p>	<p><i>Prisons (Correctional Services) Act 1980</i> (NT)</p> <p>Treatment programs are possible through these provisions to any prisoner on a consensual basis</p>
			C1, C2, C3, C4	C1, C2, C3, C4
Australian Capital Territory	—	<p><i>Crimes (Sentencing) Act 2005</i> (ACT)</p> <p>s 27 Deferred Sentence Order (Post-conviction/finding of guilt)</p>	<p><i>Crimes (Sentencing) Act 2005</i> (ACT)</p> <p>s 13 Good Behaviour Order</p> <p>s 17 Non Conviction Order</p>	<p><i>Corrections Management Act 2007</i> (ACT)</p> <p>s 7(1)(d) refers to the treatment of sentenced offenders, in particular ‘to promote the offender’s rehabilitation and reintegration into society’</p> <p>s 9(f): ‘to promote, as far as practicable, the detainee’s rehabilitation and reintegration into society’</p>
		C1, C2, C3, C4	C1, C2, C3, C4	C1, C2, C3, C4

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation
Continued

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
Queensland	—	<i>Penalties and Sentences Act 1992 (Qld)</i> s 19 Order of Court (Release with conditions) (Post-conviction/finding of guilt)	<i>Penalties and Sentences Act 1992 (Qld)</i> s 9(1)(b) allows a court, in sentencing, to provide conditions in the court's order that the court considers will help the offender to be rehabilitated s 93 Probation Order s 113 Intensive Corrective Order	<i>Corrective Services Act 2000 (Qld)</i> s 266(1)(d) specifically gives directions to the Chief Executive Officer to provide services or programs to help rehabilitate offenders
		C1, C2, C3, C4	C1, C2, C3, C4	C1, C2, C3, C4

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation
Continued

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
New South Wales	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW) s 32 Persons suffering from mental illness or condition (Diversion on adjournment) C2, C3, C4		<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)	<i>Crimes (Administration of Sentences) Act 1999</i> (NSW)
	Statewide Community and Court Liaison Service	<i>Criminal Procedure Act 1986</i> (NSW) s 350 Court may adjourn proceedings to allow accused person to be assessed or to participate in intervention program (Pre-conviction/finding of guilt) <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 10(1)(c) Dismissal of charges and conditional discharge of offender on condition that the person enter into an agreement to participate in an intervention program and comply with intervention plan (Post finding of guilt) This is an Intervention Program Order s 100M Intervention Program Order s 11 Deferral of Sentence For the purpose of assessment for suitability for an intervention program, or for participation in an intervention program (and to comply with any plan arising out of the program) (Post finding of guilt — whether or not it proceeds to conviction)	s 9 Good Behaviour Bond s 12 Suspended Sentence	s 2A(1)(d) to provide for the rehabilitation of offenders with a view to their reintegration into the general community
	C2, C3, C4	C1	C1	C1

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation
Continued

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
Victoria	<p>Assessment and Referral Court List</p> <p>s 4S <i>Magistrates' Court Act 1989</i> (Vic)</p> <p>s 4Y <i>Magistrates' Court Act 1989</i> (Vic)</p> <p>C2, C3, C4</p>	<p><i>Sentencing Act 1991</i> (Vic)</p> <p>s 83A Deferral of Sentencing (Post finding of guilt)</p>	<p><i>Sentencing Act 1991</i> (Vic)</p> <p>s 36 Community Correction Order</p> <p>s 48D Treatment and Rehabilitation Condition</p> <p>s 72 Release on adjournment following conviction</p> <p>s 75 Release on adjournment without conviction</p>	<p><i>Sentencing Act 1991</i> (Vic)</p> <p>s 5(1)(c) one of the purposes for which sentences may be imposed is to 'establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated'</p> <p><i>Corrections Act 1986</i> (Vic) and Regulations make few references to rehabilitative programs and purposes.</p> <p>Section 57B concerns the rehabilitation and transition permit system for the rehabilitation of the prisoner</p>
	Mental Health Court Liaison Service			
	C2, C3, C4	C1	C1	C1

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation
Continued

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
South Australia	<p>Magistrates' Court Diversion Program</p> <p><i>Criminal Law (Sentencing) Act 1988 (SA)</i></p> <p>s 19C(1) Release without conviction or penalty Conditional upon: mental impairment explains conduct constituting offence defendant completed/is participating in intervention program Defendant recognizes mental impairment and is making a conscientious attempt to overcome the associated behavioural problems Release of defendant does not pose an unacceptable risk</p> <p>s 19C(2) Dismissal before charge finally determined Conditional upon mental impairment explains conduct constituting offence defendant completed/is participating in intervention program Defendant recognizes mental impairment and is making a conscientious attempt to overcome the associated behavioural problems Release of defendant does not pose an unacceptable risk</p> <p>s 19C(3) Release on Undertaking to complete intervention program</p>	<p><i>Criminal Law (Sentencing) Act 1988 (SA)</i></p> <p>s 19B Deferral of Sentence for rehabilitation (Post finding of guilt — whether or not it proceeds to conviction)</p>	<p><i>Criminal Law (Sentencing) Act 1988 (SA)</i></p> <p>s 38 Good Behaviour Bond (Suspension of imprisonment on entering bond)</p> <p>s 39 Good Behaviour Bond (Discharge without sentence on entering bond)</p> <p>s 42(1)(da) and (d) Undertake Intervention Program</p>	<p><i>Criminal Law (Sentencing) Act 1988</i></p> <p>The Department for Correctional Services offender-rehabilitation operates in accordance with the <i>Correctional Services Act 1982 (SA)</i> s 23, which relates to prisoner assessment</p> <p>s (3)(i) In carrying out an assessment under this section, the Chief Executive Officer must have regard to where relevant, any proposed plans in respect of the release of the prisoner and his or her social rehabilitation</p> <p>DCS Policy statement: Offenders and prisoners with an assessed need will be provided with a range of targeted programs and services that will assist them in developing appropriate social and vocational skills to prevent their reoffending</p>
	C2, C3, C4	C1	C1	C1

Table: FLRT-Utilization within Existing Mechanisms for Offender-Rehabilitation
Continued

State	Diversionary Mechanism	Regular Criminal Justice System		
		Non-Custodial		Custodial
		Pre-Sentence	Post-Sentence	
Western Australia	Specialist Treatment and Assessment Referral Team C2, C3, C4	Sentencing Act 1995 (WA) s 33A–K Pre-Sentence Order (Post finding of guilt) C1	Sentencing Act 1995 (WA) s 47–52 Conditional Release Order s 61–67 Community Based Order s 68–76 Intensive Supervision Order s 84A Conditional Suspended Sentence C1	Prisons Act 1981 (WA) s 95 (<i>Preparation and Implementation of Activity Programs</i>) (1) Without limiting the responsibility of the chief executive officer for the welfare of prisoners conferred by section 7(1), the chief executive officer may arrange for the provision of services and programs for the well-being and rehabilitation of prisoners. C1
Tasmania	Mental Health and Cognitive Diversion List C2, C3, C4	Sentencing Act 1997 (Tas) s 7(f) Adjournment on undertaking with conditions (Post finding of guilt — with or without recording a conviction) C1	Sentencing Act 1997 (Tas) s 32 Community Service Order s 37(2) Probation Order C1	Corrections Act 1997 (Tas) No direction regarding rehabilitation or programs C1

CHAPTER 5

APPRAISAL AND OPTIMAL FLRT-UTILIZATION IN THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

I INTRODUCTION

Chapter 4 critiqued the plausibility of FLRT-utilization within the existing Australian legal framework in Australia. This included an examination of the extant diversionary mechanisms and the regular criminal justice system in each State and Territory. FLRT-utilization for categorized impulse-control management, as established in Chapter 2, was addressed and summarized in a table at the end.

This chapter elucidates the argument for diversifying this therapeutic practice by widening its jurisdictional ambit. The utility of FLRT as part of court-mandated rehabilitative treatment, rather than full diversion, for major indictable offences in superior courts is advocated. The use of FLRT in tribunals that assess the continued detention of both civilly committed and forensic patients, as well as those that determine issues of mental responsibility, are also considered. Optimal FLRT-utilization may extend to other diversionary schemes, including police diversion, drug diversion and indigenous-specific diversionary programs. Youth offenders may also benefit from FLRT — in a diversionary capacity, as well as in detention and post-release. The value of FLRT in adult custodial programs and post-release programs is also advanced.

II DISCRETIONARY NEURODIVERSION TEST APPLIED

This chapter proceeds on one of the bases established in Chapter 2, namely, that judicial determination of the appropriateness of FLRT in the absence of a mental illness (that is, C1 offenders) could be guided by factors proffered by Rogers and Shuman.⁶¹⁷ Those factors include the defendant's perceived options, decision-making abilities, the

⁶¹⁷ R Rogers and D W Shuman, *Conducting Insanity Evaluations* (Guilford Press, 2nd ed, 2000) 80.

deliberateness of the actions, and the point at which criminal actions become ‘inevitable’.⁶¹⁸ This approach could be adopted in conjunction with Webster and Jackson,⁶¹⁹ who provide a clinical perspective of ‘impulse-driven conduct’, with the following characteristics enveloped in five domains: (1) interpersonal dysfunction: manipulative, black/white thinking with regard to others, distrustful; (2) lack of plans: avoidance of change, volatile lifestyle; (3) distorted self-esteem: low self-awareness, hopelessness, acting rashly to avoid emotional discomfort; (4) anger and rage: aggression, low frustration tolerance, high explosivity; and (5) irresponsibility: entitlement, beliefs that most others act immorally and irresponsibly, poor ability to cope with emotional discomfort.

In the application of this test to determine the utility of FLRT for a non-mentally ill C1 offender, ‘clinicians can offer descriptive and explanatory testimony relevant to an offender’s impairment, and the relationship between that impairment and the criminal conduct at issue’.⁶²⁰ There is ‘utility to clinical expertise when it provides thorough description of clinicians’ unique understanding of human behavior’,⁶²¹ which in turn assists the court in its normative judgement, and early detection of a potential impulse-control problem.

⁶¹⁸ Ibid.

⁶¹⁹ C D Webster and M A Jackson, ‘A Clinical Perspective on Impulsivity’ in C D Webster and M A Jackson (eds), *Impulsivity: Theory, Assessment, and Treatment* (Guilford Press, 1997) 16.

⁶²⁰ R F Schopp and B J Sturgis, ‘Sexual Predators and Legal Mental Illness for Civil Commitment’ (1995) 13 *Behavioral Sciences and the Law* 437.

⁶²¹ Cynthia Calkins Mercado, Robert F Schopp and Brian H Bornstein, ‘Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment?’ (2005) 10 *Aggression and Violent Behavior* 289, 296.

III APPRAISAL: FLRT-UTILIZATION IN THE EXISTING AUSTRALIAN LEGAL CRIMINAL JUSTICE SYSTEM

At its most basic level, effective treatment options would help those who want to help themselves. Whether for those already in prison or for preventative treatment with individuals who are aware that they are at risk of anti-social behaviours, effective treatment methods offer people an opportunity to stay out of the system ...⁶²²

A All Together Now: The Diagnosis, The Offence and The Existing Criminal Justice System

By pairing each category of impulse-control with a specific offence — for example, theft, which is an offence commonly documented among mentally ill offenders⁶²³ — insight into offender trajectory through the existing framework can be gleaned.

For a C1 offender charged with theft, he or she would not be eligible for participation in a diversionary scheme, as ‘pure’ poor impulse-control does not amount to a mental disorder. As this category of offending has the broadest scope for judicial discretion, it may be that such an offender could be directed into FLRT through the regular criminal justice system, as assisted by clinicians when making this determination. (This has been elaborated upon in Chapter 2.)

For a C2 offender diagnosed with Antisocial Personality Disorder (categorized under Disruptive, Impulse-Control and Conduct Disorders in the DSM-5)⁶²⁴ and charged with theft, FLRT could be administered through MHDCTs.

⁶²² David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 166.

⁶²³ Magistrates Court Tasmania, *Mental Health Diversion List Procedural Manual* (April 2007) 3; Grace Skrzypiec, Joy Wundersitz and Helen McRostie, ‘Magistrates Court Diversion Program, An Analysis of Post-Program Offending’ (2004) *Office of Crime Statistics and Research 1*; New South Wales Law Reform Commission, ‘People with an Intellectual Disability and the Criminal Justice System’ (Report 80, New South Wales Law Reform Commission Report, December 1996) 32–3; Esther Newitt and Victor Stojcevski, ‘Mental Health Diversion List’ (Evaluation Report, Magistrates Court Tasmania, May 2009) 49; Nichole Hunter and Helen McRostie, Helen, ‘Magistrates Court Diversion Program, Overview of Key Data Findings’ (2001) 20 *Office of Crime Statistics and Research 1*.

⁶²⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Publishing, 5th ed, 2013) 461.

A C3 offender diagnosed with Bipolar I Disorder — a disorder commonly reported within Australian MHDCts,⁶²⁵ and for which impulse-control is a diagnostic criterion — and charged with theft, FLRT could be administered through MHDCts.

A C4 offender diagnosed with a Depressive Disorder — a disorder also commonly reported within Australian MHDCts⁶²⁶ and for which impulse-control is not part of the defining criteria, but may be an additional significant problem — and charged with theft, FLRT could be administered through MHDCts.

Those jurisdictions for which a broader range of mental disorders are considered diversion-appropriate are preferable to those with stringent exclusionary criteria. For example, in South Australia, the MCDP is open to those with a personality disorder, whereas in Western Australia, those with a primary diagnosis of personality disorder are not admitted into the program.

Jurisdictions offering pre-sentence diversionary options adjourning proceedings to allow an offender to participate in a diversionary program further underpin the notion of rehabilitation and thus enable the availability of FLRT at the earliest possible stage.

B *Offenders Eligible for Diversion but Overlooked*

Although not depicted diagrammatically in the table in Chapter 4, in those jurisdictions with diversionary mechanisms, FLRT options available in mainstream courts could be available to mentally ill C2, C3 and C4 offenders *if* they are not captured through the available diversionary scheme and thus proceed through the mainstream court, or if they

⁶²⁵ Esther Newitt and Victor Stojcevski, 'Mental Health Diversion List' (Evaluation Report, Magistrates Court Tasmania, May 2009) 52; J Sharples et al, 'Offending Behaviour and Mental Illness: Characteristics of a Mental Health Court Liaison Service' (2003) 10 *Psychiatry, Psychology and Law* 300, 306; Nichole Hunter and Helen McRostie, Helen, 'Magistrates Court Diversion Program, Overview of Key Data Findings' (2001) 20 *Office of Crime Statistics and Research* 1.

⁶²⁶ Ibid.

do fall within in a diversionary scheme and receive a sentence similar to what would be imposed in the regular system.

Some jurisdictions offer a safeguard against offenders ‘slipping through the cracks’, so to speak. For example, in Tasmania, an application for referral to the Mental Health and Cognitive Diversion List can be made at any time prior to the finalization of a matter.⁶²⁷ Thus, if for some reason an offender is not recognized as eligible for participation in a diversionary scheme, and instead proceeds through the mainstream court, he or she retains the ability for referral to a diversionary scheme at any time.

In New South Wales, an offender may be referred for participation in an intervention program at several points during criminal proceedings. For example, a court that grants bail to a person may, under s 36A(1) of the *Bail Act 1978* (NSW), impose a condition of bail that the person enter into an agreement to subject himself or herself to an assessment of his or her capacity and prospects for participation in an intervention program or other program for treatment or rehabilitation. Prior to a conviction or a finding of guilt, s 350 of the *Criminal Procedure Act 1986* (NSW) empowers the court to adjourn proceedings to allow the accused person to be assessed for or to participate in an intervention program.

C Offenders Return to General List

In Tasmania, if a defendant is returned to the general list, he or she still retains the option of making an application of being unfit to stand trial or pleading not guilty by reason of insanity, pursuant to the *Criminal Justice (Mental Impairment) Act 1999* (Tas). In South Australia, defendants who are not accepted into the diversionary program will have their matters sent back to the general court list for finalization at a later date and retain their rights to conduct a defence in accordance with s 269 of the *Criminal Law Consolidation Act 1935* (SA). Regarded as the ‘mental incompetence’ or ‘section 269’ defence,⁶²⁸ this

⁶²⁷ Magistrates Court Tasmania, *Mental Health Diversion List Procedural Manual* (April 2007).

⁶²⁸ *Criminal Law Consolidation Act 1935* (SA) s 269.

defence originated from the ‘insanity defence’. The Mental Impairment Provisions (Part 8A) of the *Criminal Law Consolidation Act 1935* (SA) deal with offenders found to be ‘unfit to stand trial’ or not guilty on the basis of being ‘mentally incompetent to have committed an offence’.

1 *Insanity*

Matters surrounding the common law defence of insanity are not germane to this thesis. However, in an attempt to situate the matter of an offender leaving a diversionary list and returning to the regular criminal list, an overview of selected jurisdictions is nevertheless provided. A purely legal construct, and not a psychological illness or mental disorder classified in the DSM-5, insanity refers to ‘being of unsound mind’.⁶²⁹ The presumption of sanity — that every person is of sound mind and was of sound mind at any time — is called into question when the contrary is proved.⁶³⁰

(a) *Unsound Mind*

Unsound mind is a state of mind caused by disease, disorder or disturbance (temporary or long-standing) that prevents a person from knowing the physical nature of an act that the person is committing, or from appreciating that the act was wrong. It is a condition in which the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder and, therefore, the person is relieved of criminal responsibility for the act.⁶³¹ An accused generally bears the onus of proving insanity on the balance of probabilities.⁶³² An accused found not guilty on the grounds of mental illness or impairment is not discharged but rather is subject to orders made under the relevant operative statutory regime.⁶³³

⁶²⁹ *M’Naghten’s case* (1843) 10 Cl & F 200, 8 ER 718, 722; Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 231.

⁶³⁰ *M’Naghten’s case* (1843) 10 Cl & F 200, 8 ER 718.

⁶³¹ See *R v Porter* (1936) 55 CLR 182; *R v S* [1979] 2 NSWLR 1.

⁶³² *R v Foy* [1960] Qd R 225.

⁶³³ See, eg, *Crimes Act 1914* (Cth) s 20BJ(1); *Mental Health (Criminal Procedure) Act 1990* (NSW) s 39; *Criminal Code* (Qld) s 647; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 23.

(b) *M'Naghten's Case*

In the context of insanity, defining volitional impairment has long proved problematic for courts. The earliest codification of a criminal responsibility standard dates back to *M'Naghten's Case* in 1843.⁶³⁴ The *M'Naghten* test for insanity was purely cognitive, focusing solely on whether the defendant had knowledge of the nature and quality of the criminal act, and whether he or she knew that the act was wrong.⁶³⁵ The landmark test entrenched the viewpoint that mental disorder could absolve an individual from criminal responsibility.⁶³⁶

An 'irresistible impulse' rule arose in response to the criticism of the narrowness of the *M'Naghten* test. The standard was then broadened to include severe volitional impairment in individuals who were otherwise aware of the wrongfulness of their actions.⁶³⁷ This test was also met with resistance, as it required total cognitive or volitional incapacity — an absolutist standpoint that was 'considered increasingly outdated and irrelevant'.⁶³⁸

In 1962, the American Law Institute (ALI) published its Model Penal Code, in which a new insanity defence standard was to include both volitional and cognitive components: 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.'⁶³⁹ The term 'substantial capacity' thus required capacity less than total cognitive or volitional impairment.

⁶³⁴ *M'Naghten's case* (1843) 10 Cl & F 200, 8 ER 718.

⁶³⁵ G B Melton et al, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (Guilford Press, 2nd ed, 1997).

⁶³⁶ J E P Wallis, *Reports of State Trials: New Series, 1839 to 1843* (Her Majesty's Stationary Office, 1892).

⁶³⁷ *Parsons v State*, 81 Ala 577, 2 So 854 (1886).

⁶³⁸ J R P Ogloff, C F Roberts and R Roesch, 'The Insanity Defense: Legal Standards and Clinical Assessment' (1993) 2 *Applied & Preventive Psychology* 163.

⁶³⁹ G B Melton et al, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (Guilford Press, 2nd ed, 1997).

The volitional prong of the test fell once more into public disfavour when it was feared that less-consistent application of the insanity defence would result from utilizing such an imprecise standard.⁶⁴⁰ Punctuated by the American Psychiatric Association, it was aptly concluded that '[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk'.⁶⁴¹

The ALI formulation fell out of use and there was a return to the application of the strictly cognitive *M'Naughten* test.⁶⁴² Central to the rules was the notion that a defence on the grounds of insanity could be established if it was proved that at the time of committing a crime the accused was suffering from a disease of the mind so as not to know the nature and quality of the act or that the act was wrong.⁶⁴³

The *M'Naghten* rules provide the requirement for the common law defence of insanity that at the time of committing the act the accused was labouring under such a defect of reason, owing to disease of the mind, as not to know the nature and quality his or her act, or, if the accused did know it, he or she did not know that what he or she was doing was wrong.⁶⁴⁴

Australian cases have qualified the *M'Naghten* rules. The High Court in *R v Porter* stated that the condition of the accused's mind is relevant only at the time of the *actus reus*.⁶⁴⁵ In *Woodbridge v The Queen* the Court stated that a symptom indicating a disease of the mind must be prone to recur and be the result of an underlying pathological infirmity.⁶⁴⁶

⁶⁴⁰ Ibid.

⁶⁴¹ American Psychiatric Association, 'American Psychiatric Association Statement on the Insanity Defense' (1983) 140 *American Journal of Psychiatry* 681, 685.

⁶⁴² G B Melton et al, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (Guilford Press, 2nd ed, 1997). However, there are still jurisdictions today that adhere to the ALI formulation as detailed in Michael L Perlin, *The Jurisprudence of the Insanity Defence* (Carolina Academic Press, 1995).

⁶⁴³ J E P Wallis, *Reports of State Trials: New Series, 1839 to 1843* (Her Majesty's Stationary Office, 1892).

⁶⁴⁴ Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 293.

⁶⁴⁵ *R v Porter* [1933] HCA 1; *actus reus* constitutes the physical element of an offence.

⁶⁴⁶ *Woodbridge v The Queen* (2010) 208 A Crim R 503, 531 (Davies J).

A ‘defect of reason’ is the inability to think rationally and pertains to an incapacity to reason, rather than one’s having unsound ideas.⁶⁴⁷

In Australia, the defence of mental disorder — sometimes also referred to as the defence of mental illness — is a legal defence by way of excuse, whereby a defendant may argue that he or she should not be held criminally liable for his or her actions because he or she was mentally ill at the time of the alleged offence. These criminal laws of Australia are a statutory version of the *M’Naghten* rules, renamed to quell the stigma often associated with the label of ‘insanity’.

An accused raising the insanity defence is different from a situation where an accused is deemed unfit to plead because of insanity. The latter refers to the principle that an accused can only be put on trial if he is actually mentally fit to participate in it.⁶⁴⁸ The question of fitness is a matter for a judge alone.⁶⁴⁹

In Victoria the current defence of mental impairment was introduced in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), which replaced the common law defence of insanity.⁶⁵⁰ Where the defence is established the person must be found not guilty because of mental impairment.

In New South Wales, the defence has been renamed the ‘Defence of Mental Illness’ in Part 4 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). However, definitions of the defence are derived from *M’Naghten’s Case* and have not been codified. Whether a particular condition amounts to a disease of the mind is not a medical but rather a legal question to be decided in accordance with the ordinary rules of interpretation. If the insanity defence is successfully proven, the court issues a special verdict of ‘not guilty by reason of mental illness’ in accordance with s 38 of *Mental Health (Forensic Provisions) Act 1990* (NSW).

⁶⁴⁷ *R v Porter* [1933] HCA 1.

⁶⁴⁸ *R v Presser* (1994) 181 CLR 230; *R v Rivkin* [2004] NSWCCA 7.

⁶⁴⁹ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 11.

⁶⁵⁰ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 20, 25.

For offenders who may return to the general list and are better suited to an application of being unfit to stand trial or pleading guilty by reason of insanity, FLRT may not be an efficacious rehabilitative option. Conceivably, it may serve an adjunctive role in an offender's mental health treatment regime, but it would not be utilized in a diversionary capacity.

The following examination details suggestions for optimal FLRT-utilization within the Australian legal framework.

IV OPTIMAL FLRT-UTILIZATION IN THE AUSTRALIAN LEGAL CRIMINAL JUSTICE SYSTEM

This thesis does not advocate a complete revolution of the current system. Rather, the system could be amended to effectively incorporate FLRT for therapeutic outcome-maximization. The utility of FLRT reaches beyond the existing parameters elaborated upon in Chapter 4.

A *Nation-wide MHDCts*

The Northern Territory, Australian Capital Territory and Queensland do not have MHDCts. Thus, for offenders suffering from a mental illness, as defined in C2, C3 and C4, no mental health diversionary mechanism exists through which FLRT could be administered. Instead, such offenders in those jurisdictions could only receive FLRT through the regular criminal justice system; consequently, they are not presently afforded the opportunity to address their illness and offending in a diversionary setting.

This thesis contends that diversionary mechanisms would benefit these jurisdictions. Although it may be possible to obtain FLRT through the regular criminal justice system, of greater benefit would be to introduce a diversionary mechanism in those jurisdictions. MHDCts provide a nuanced approach to mental illness and offending that serve to enhance the rehabilitation of such offenders.

B *Broadening of Jurisdictional Utility*

Diversifying this therapeutic treatment by widening the jurisdictional ambit is one suggested amendment to the current criminal justice system. FLRT could have utility in higher courts — District Courts and Supreme Courts — for major indictable offences, as part of court-mandated rehabilitative treatment, not as full diversion into a diversionary court.

Indeed, this suggestion addresses the criticism that the arm of therapeutic jurisprudence — an ‘oddly truncated reach of a movement with such seemingly unbounded and hopeful activism’⁶⁵¹ — extends only to summary or minor offences whereby ‘there are no aggravated robbery courts where we try to solve the social problems of armed robbers or community rape courts where we encourage rapists to apologize to victims’.⁶⁵²

At present, legislative powers of diversion under the *Mental Health (Forensic Provisions) Act 1990* (NSW) and the South Australian MHDP enable diversion for summary and minor indictable offences.⁶⁵³ Diversion under the New South Wales Statewide Community and Court Liaison Service provides a court-based diversion program for individuals charged with non-indictable offences only.⁶⁵⁴

The Victorian Assessment and Referral Court List precludes offences of a violent, serious violent or serious sexual nature,⁶⁵⁵ yet less serious offences that may typically be listed include recklessly causing serious injury, making threats to kill, and indecent assault. Similarly, the Western Australian START Court does not admit those charged with serious offending or who are considered a high risk to the community.

⁶⁵¹ Ibid.

⁶⁵² Ibid.

⁶⁵³ *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 32, 33; Nichole Hunter and Helen McRostie, ‘Magistrates Court Diversion Program, Overview of Key Data Findings’ (2001) 20 *Office of Crime Statistics and Research* 1, 4.

⁶⁵⁴ D Greenberg and B Nielsen, ‘Court Diversion in NSW for People with Mental Health Problems and Disorders’ (2002) 13 *NSW Public Health Bulletin* 158.

⁶⁵⁵ *Sentencing Act 1991* (Vic) s 6B(1) sch 1 ss 1, 2, 3.

Major indictable⁶⁵⁶ or serious indictable⁶⁵⁷ offences are serious crimes that are usually triable by judge and jury only, and will therefore be heard in the superior courts (either the District Court or the Supreme Court). Types of indictable offences include aggravated burglary, indecent assault, rape, and drug trafficking offences. The most serious offences — murder, attempted murder, and treason — are dealt with in the Supreme Court.

For major indictable offences or offences unable to be diverted and committed by an offender in any category, FLRT may be available at the discretion of the judge through the regular criminal justice system. This would be as a condition of sentencing, not full diversion.

C *FLRT-Utility in the Commonwealth*

The most commonly encountered Commonwealth offences are found in the *Crimes Act 1914* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Commonwealth law is different from State law in that there are only two categories of offences: summary offences and indictable offences. If the matter is to be dealt with summarily, then the same procedure as for any State matter applies.⁶⁵⁸ Summary offences are those involving a maximum penalty of 12 months or less, or no penalty of imprisonment.⁶⁵⁹

Indictable offences involve a penalty of more than 12 months' imprisonment.⁶⁶⁰ Indictable offences with penalties of imprisonment not exceeding 10 years may be dealt with summarily or either party can elect to have the matter indicted, and the committal process commences.⁶⁶¹ When matters are indicted to a higher court for trial, the trial must be by jury.⁶⁶² Importantly, all Commonwealth offenders are sentenced pursuant to Part

⁶⁵⁶ See, eg, *Criminal Code* (Qld) s 3; *Criminal Code* (NT) s 3; *Legislation Act 2001* (ACT) s 190.

⁶⁵⁷ See, eg, *Crimes Act 1900* (NSW) s 4; *Crimes Act 1958* (Vic) s 325(6).

⁶⁵⁸ *Judiciary Act 1903* (Cth) s 68.

⁶⁵⁹ *Crimes Act 1914* (Cth) s 4H.

⁶⁶⁰ *Ibid* s 4G.

⁶⁶¹ *Ibid* s 4J.

⁶⁶² *Commonwealth of Australia Constitution Act* (Cth) s 80.

1B of the *Crimes Act 1914* (Cth), which sets out general sentencing principles and makes extensive provisions in relation to the sentencing process and sentences that may be imposed. A federal offender is defined by the Act as a person convicted of an offence against Commonwealth law.⁶⁶³ State sentencing options apply only to the extent that they are expressed to be applicable by virtue of a specific provision of the Act or its Regulations.

A court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.⁶⁶⁴ Pursuant to s 19B(1)(d) of the Act, an offender can be discharged completely or on a recognizance. The conditions of the recognizance may include good behaviour for a period of up to three years, inclusive of any condition that the court sees fit to impose. Similarly, under s 20 of the Act, an offender can be subject to a good behaviour bond for a period of up to five years, probation for up to two years, or any other condition that the court sees fit to impose. Participation in FLRT could be a program into which an offender is directed to participate in accordance with ss 19B(1)(d) and 20 of the Act.

A person who is charged before a court of summary jurisdiction with Commonwealth offences and who is suffering from a mental illness at the time the matter comes before the court for determination may be dealt with under s 20QB of the *Crimes Act 1914* (Cth). For example, the court has power to dismiss the charge and discharge the person if it considers this would be more appropriate than dealing with a defendant otherwise according to law.⁶⁶⁵ In more serious summary court matters where the Court is not persuaded that it is appropriate for the defendant to be dealt with under s 20BQ of the *Crimes Act 1914* (Cth), questions of mental competence to commit the offence and mental fitness to stand trial are first determined under the relevant provisions of State legislation and, where the defendant is found to be mentally incompetent or mentally unfit, subsequent orders for disposition come under the relevant Commonwealth

⁶⁶³ *Crimes Act 1914* (Cth) s 16(1).

⁶⁶⁴ *Ibid* s 16A(1).

⁶⁶⁵ *Ibid* s 20BQ.

provisions.⁶⁶⁶ Section 7.3 of the *Criminal Code Act 1995* (Cth) also sets out the Commonwealth provisions regarding the defence of mental impairment. Under that Act, ‘mental impairment’ is defined to include ‘senility, intellectual disability, mental illness, brain damage and severe personality disorder’. Depending on the degree of impairment, participation in FLRT could be a program into which an offender is directed to participate. A clinician may assist in the determination of mental competency and speculate on the neuroplasticity capabilities, consequently portending the utility and appropriateness of FLRT administration on an individual basis.

D *FLRT-Utility in Tribunals*

All States and Territories of Australia have established mental health tribunals to assess the continued detention of both civilly committed and forensic patients in the mental health systems.⁶⁶⁷ There are provisions in the laws of each State and Territory for the prosecution and disposition of persons with a mental illness or an intellectual disability.⁶⁶⁸ These laws provide that unsoundness of mind is a defence to a criminal charge. Application of these laws means that some persons charged with criminal offences are judged not fit to enter a plea, or are found not guilty because of mental disorder, and become ‘forensic patients’.⁶⁶⁹ People who have been charged with indictable offences, especially those involving serious violence, and who have been found not fit for trial or acquitted on grounds of mental impairment, are likely to be ordered to be treated in a secure facility.

Queensland has a Mental Health Court, which determines mental responsibility issues — the insanity defence or the defence of diminished responsibility. The Court is constituted by a Supreme Court Judge who receives expert advice and assistance on clinical matters from two ‘assisting psychiatrists’. References may be made to the Court by the accused

⁶⁶⁶ Ibid ss 20BS–20Y.

⁶⁶⁷ Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — from Crisis to Community* (December 2006) 13.14.

⁶⁶⁸ Ibid 13.2.

⁶⁶⁹ Ibid 13.3.

or the accused's legal representative, the Attorney-General, the Director of Public Prosecutions or the Director of Mental Health. The Court is not bound by the rules of evidence and may inform itself in any way it considers appropriate. It may order examinations by psychiatrists and other health professionals and may make forensic orders to provide for treatment in the mental health system.⁶⁷⁰

The tribunals are constituted differently in different jurisdictions, but typically include people with legal and medical qualifications and a member (or members) of the community. They also have different powers; some may make determinations while others make recommendations to the courts or the executive government. In jurisdictions where the tribunals have an advisory role, the decision to release a person from a custodial order will be made by a court or, in some jurisdictions, by the Governor in Council.⁶⁷¹

In New South Wales, if a person is found to be unfit, he or she is referred to the Mental Health Review Tribunal.⁶⁷² The tribunal decides whether he or she will be fit to stand trial within the next 12 months.⁶⁷³ If so, the Court may either grant bail, detain the person in a hospital facility, or detain the person in another facility.⁶⁷⁴ If not, the Court notifies the Director of Public Prosecutions,⁶⁷⁵ who decides whether to pursue the case or not. If the Director of Public Prosecutions decides that the case should proceed, a 'special hearing' is held.⁶⁷⁶ A verdict from the special hearing cannot be appealed.

The procedure for the issue of 'fitness to plead' is executed differently. The defendant must be established as developmentally disabled, which means suffering from a mental condition or being mentally ill within the meaning of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Such people are governed by s 32 (people suffering from a

⁶⁷⁰ Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — from Crisis to Community* (December 2006) 13.15.

⁶⁷¹ Ibid.

⁶⁷² *Mental Health (Forensic Provisions) Act 1990* (NSW) s 14.

⁶⁷³ Ibid s 16.

⁶⁷⁴ Ibid s 17.

⁶⁷⁵ Ibid s 16.

⁶⁷⁶ Ibid s 19.

mental condition/developmentally disabled) and s 33 (people suffering from a mental illness), which allow the judge to make a wide variety of orders, including dismissing charges or placing the person under another's care. The provisions invest in the magistrate a wide discretion, which is exercised while keeping in mind the interests of the person and the community.⁶⁷⁷ These provisions allow people suffering from such disorders to be diverted away from the criminal justice system.

Forensic patients are held within health institutions until they are approved for release by the Mental Health Review Tribunal. The term 'forensic patients' refers to persons found not guilty by reason of mental illness, and persons found unfit to plead. There used to be a third category of 'transferees' — people who became mentally ill while in prison and were transferred to a health institution. There is now a formal distinction between those people (now termed 'correctional patients') and forensic patients. The Mental Health Tribunal initially reviews those patients who were found not guilty by reason of the mental illness defence. Thereafter, they are reviewed every six months by the tribunal.⁶⁷⁸

It may be an option for FLRT to be administered to those who come before such tribunals, yet whether the requisite neuroplasticity is present would be a large determining factor. This discretion to invoke the rehabilitative properties of the treatment would rest with an experienced clinician.

E *FLRT-Utility in Other Diversionary Schemes*

1 *Police Diversion*

The police may exercise diversion as a form of early intervention — mostly in the form of cautioning, both informal and formal.⁶⁷⁹ An informal cautioning is usually from the

⁶⁷⁷ See, eg, *Confos v DPP* [2004] NSWSC 1159.

⁶⁷⁸ David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, (Federation Press, 5th ed, 2011) 525–8.

⁶⁷⁹ K Polk et al, 'Early Intervention: Diversion with and Youth Conferencing: A National Profile and Review of Current Approaches to Diverting Juveniles from the Criminal Justice System' (Report,

officer attending the scene of the offence. If the matter is not of sufficient gravity, or is unclear, then the officer may give a verbal warning that is not formally recorded.

The formal cautioning involves recording the details of the offence. In most cases, the offender is asked to attend the police station for a formal warning. In the case of young offenders, parents or other responsible adults may be asked to join the cautioning process. No further action is usually required and the offender is diverted out of the justice system. More recently, however, formal police diversion includes other add-ons such as fines, community service and participation in treatment programs.⁶⁸⁰ FLRT could be one such program.

Diversion programs overseen by police include: the Cannabis Cautioning Scheme in New South Wales; the Cannabis Cautioning Program and Drug Diversion Program⁶⁸¹ in Victoria; the Queensland Police Diversion Program in Queensland;⁶⁸² the Cannabis Intervention Requirement and All Drug Diversion in Western Australia; the Police Drug Diversion Initiative⁶⁸³ in South Australia; the Illicit Drug Diversion Initiative in Tasmania; the Early Intervention and Diversion Program⁶⁸⁴ and Simple Cannabis Offence Notice⁶⁸⁵ in the Australian Capital Territory; and the Cannabis Expiation Notice Scheme,⁶⁸⁶ Illicit Drug Pre-court Diversion Program, and the Youth Diversion Program in the Northern Territory.

Australian Government Attorney-General's Department, 2010); K Richards, 'Police-Referred Restorative Justice for Juveniles in Australia' (Trends and Issues in Crime and Criminal Justice No 398, Australian Institute of Criminology, 2010).

⁶⁸⁰ Australian Institute of Health and Welfare, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 5.

⁶⁸¹ Ibid.

⁶⁸² Governed by *Police Powers and Responsibilities Act 2000* (Qld) and *Penalties and Sentences Act 1992* (Qld).

⁶⁸³ Operating under the *Controlled Substances Act 1984* (SA).

⁶⁸⁴ Pursuant to the *Drugs of Dependence Act 1989* (ACT).

⁶⁸⁵ Ibid.

⁶⁸⁶ Pursuant to the *Misuse of Drugs Act 1990* (NT).

2 Drug Diversion

The need to divert illicit drug users into treatment programs for their addiction is an example of therapeutic jurisprudence in operation in Australia.⁶⁸⁷ A variety of programs have been established that seek to cease or reduce criminal activity related to drug abuse in Australia. The drug diversion programs often include close supervision, regular drug testing, sanctions, therapy and support services.⁶⁸⁸ It may be appropriate for an offender to be referred to FLRT as an adjunct therapy to drug and alcohol counselling. Special drug courts have been established in New South Wales,⁶⁸⁹ Queensland,⁶⁹⁰ South Australia,⁶⁹¹ Victoria⁶⁹² and Western Australia⁶⁹³ to establish and manage drug diversionary programs.⁶⁹⁴

FLRT could be utilized as an adjunctive treatment to existing drug court-mandated programs within Australia. For example, FLRT may be assimilated within the New South Wales court-based drug diversion program and Magistrates Early Referral into Treatment (MERIT) initiative,⁶⁹⁵ the Victorian Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT)⁶⁹⁶ and Rural Outreach Diversion Worker Service,⁶⁹⁷ the Queensland court-based Drug Diversion Program, the Queensland Magistrates Early

⁶⁸⁷ Melissa Bull, 'Just Treatment: A Review of International Programs for the Diversion of Drug Related Offenders from the Criminal Justice System' (Report for the Department of the Premier and Cabinet, June 2003).

⁶⁸⁸ E Ziersch and J Marshall, 'The South Australian Drug Court: A Recidivism Study' (Report, South Australian Attorney-General's Department, May 2012); C Spooner, W Hall and R P Mattick, 'An Overview of Diversion Strategies for Australian Drug-Related Offenders' (2001) 20 *Drug and Alcohol Review* 281.

⁶⁸⁹ Pursuant to the *Drug Court Act 1998* (NSW).

⁶⁹⁰ Pursuant to the *Queensland Drug Rehabilitation (Court Diversion) Act 2000*.

⁶⁹¹ Pursuant to the *Magistrates Court Act 1991* (SA); *Criminal Law (Sentencing) Act 1988* (SA); *Bail Act 1985* (SA).

⁶⁹² Pursuant to the *Sentencing (Amendment) Act 2002* (Vic).

⁶⁹³ Pursuant to the *Sentencing Act 1995* (WA) and *Bail Act 1982* (WA).

⁶⁹⁴ Australian Institute of Health and Welfare, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 7.

⁶⁹⁵ Pursuant to the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW).

⁶⁹⁶ Pursuant to the *Sentencing (Amendment) Act 2002* (Vic).

⁶⁹⁷ Australian Institute of Health and Welfare, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013).

Referral into Treatment (QMERIT),⁶⁹⁸ and the Illicit Drug Court Diversion Program.⁶⁹⁹ The Western Australian Perth court-based Drug Diversion Program, the Young Person's Opportunity Program,⁷⁰⁰ the Youth Supervised Treatment Intervention Regime, the Pre-sentence Opportunity Program,⁷⁰¹ and the Supervised Treatment Intervention Regime⁷⁰² may also be appropriate for FLRT-inclusion. Similarly, FLRT may have utility if incorporated as a treatment in the South Australian court-based Drug Diversion Program, Adult Court Assessment and Referral Drug Scheme (CARDS),⁷⁰³ and Youth Court Assessment and Referral Drug Scheme (CARDS).⁷⁰⁴

FLRT could also be employed as a treatment option in the Tasmanian Court Mandated Diversion Program,⁷⁰⁵ the Australian Capital Territory Court Alcohol and Drug Assessment Service (CADAS),⁷⁰⁶ and the Northern Territory Substance Misuse Assessment and Referral for Treatment (SMART).

3 *Indigenous Diversionary Programs*

Given the poor access to, and participation in, mainstream programs by Indigenous clients, as well as the over-representation of Aboriginal and Torres Strait Islander people in Australian prisons, a number of Indigenous-specific diversionary programs have been established in all Australian jurisdictions except Tasmania.⁷⁰⁷ These programs, which include Aboriginal courts and conferences, as well as alcohol and substance abuse reduction programs, foster an environment that is less intimidating and culturally more

⁶⁹⁸ Pursuant to the *Bail Act 1980* (Qld).

⁶⁹⁹ Pursuant to the *Drugs Misuse Act 1986* (Qld).

⁷⁰⁰ Operating via the Juvenile Justice Teams which operate under the *Young Offenders Act 1994* (WA).

⁷⁰¹ Pursuant to the *Bail Act 1982* (WA).

⁷⁰² Ibid.

⁷⁰³ Pursuant to the *Magistrates Court Act 1991* (SA); *Criminal Law (Sentencing) Act 1988* (SA); *Bail Act 1985* (SA).

⁷⁰⁴ Ibid.

⁷⁰⁵ Newitt, Esther and Victor Stojcevski, 'Mental Health Diversion List' (Evaluation Report, Magistrates Court Tasmania, May 2009).

⁷⁰⁶ Pursuant to the *Bail (Amendment) Act 1997* (ACT).

⁷⁰⁷ Australian Institute of Health and Welfare, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 14.

acceptable to Indigenous people.⁷⁰⁸ In addition, a variety of programs have been established to support reintegration of Indigenous offenders into the community — to divert them from entering into the justice system initially and to improve community safety. Aboriginal courts and conferences seek to create an environment that is more socially and culturally appropriate than the mainstream courts for Indigenous people.⁷⁰⁹ These courts involve Aboriginal Elders and other respected community members.

New South Wales has Circle Sentencing⁷¹⁰ and an Intensive Court Supervision Program. Victoria has Koori courts for Adults and for Children.⁷¹¹ Queensland has the Murri courts for Adults and for Children,⁷¹² a Diversion from Custody Program, and the Cairns Alcohol Remand and Rehabilitation Program.⁷¹³ Western Australia has the Regional community conferencing (police diversion), Indigenous Diversion Program (IDP),⁷¹⁴ Regional Supervised Bail Program,⁷¹⁵ and Community Courts,⁷¹⁶ such as the Aboriginal Sentencing Court of Kalgoorlie.⁷¹⁷ South Australia has the Nunga Courts.⁷¹⁸ Australian Capital Territory has Ngambra Circle Sentencing.⁷¹⁹ Northern Territory has Community Courts⁷²⁰ and a Volatile Substance Abuse Program that operates in accordance with the *Volatile Substance Abuse Prevention Act 2006* (NT).

⁷⁰⁸ B Beranger, D Weatherburn and S Moffatt, 'Reducing Indigenous Contact with the Court System' (Crime and Justice Statistics Bureau Brief, Issue Paper No 54, Bureau of Crime Statistics and Research, Attorney General's Department of New South Wales, December 2010).

⁷⁰⁹ Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010).

⁷¹⁰ Pursuant to the *Criminal Procedure Amendment (Circle Sentencing Intervention) Regulations 2003* (NSW).

⁷¹¹ Pursuant to the *Magistrate's Court (Koori Court) Act 2002* (Vic).

⁷¹² Pursuant to the *Penalties and Sentences Act 1992* (Qld).

⁷¹³ Pursuant to the *Bail Act 1980* (Qld).

⁷¹⁴ Pursuant to the *Bail Act 1982* (WA).

⁷¹⁵ Ibid.

⁷¹⁶ Pursuant to the *Sentencing Legislation Amendment and Repeal Act 2002* (WA) and the *Bail Act 1982* (WA).

⁷¹⁷ Heather Aquilina et al, 'Evaluation of the Aboriginal Sentencing Court of Kalgoorlie' (Report, Shelby Consulting, 16 October 2009) 13.

⁷¹⁸ Pursuant to the *Magistrates Court Act 1991* (SA); *Criminal Law (Sentencing) Act 1988* (SA) and the *Bail Act 1985* (SA).

⁷¹⁹ Pursuant to the *Crimes Act 1900* (ACT).

⁷²⁰ Pursuant to the *Court Act 2005* (NT) and the *Volatile Substance Abuse Prevention Act 2005* (NT).

Depending on the particular matter before the court, FLRT may play an adjunctive role to the existing rehabilitative programs. Existing rehabilitative programs do not contain inhibitory or conflicting bases or practices that would preclude the utilization of FLRT. In fact, FLRT may serve to enhance the existing programs and complement rehabilitative models across a range of specialities.

4 *Young Offender Diversion*

A major focus of diversionary programs is on young offenders, many of whom are first-timer offenders and could be at risk of becoming chronic offenders.⁷²¹ In all Australian jurisdictions, children and young people may be charged with a criminal offence if they are aged 10 years or over.

Young people first enter the justice system when they are investigated by police for allegedly committing a crime. Following the investigation, a decision is made as to whether police will initiate legal action against the young person.⁷²² Such a person could face court action (the laying of charges to be answered in court) or non-court actions (such as verbal warning, cautioning, conferencing, counselling or infringement notices — commonly referred to as police diversion).

In New South Wales, youth cautioning and conferencing is available under the provisions of the *Young Offenders Act 1997* (NSW). Conferencing for young adult offenders is under the *Criminal Procedure Act 1986* (NSW). In Victoria, Juvenile cautioning is mandated by the *Children and Young Persons Act 1989* (Vic), and juvenile justice group conferencing falls under the *Children, Youth and Families Act 2005* (Vic).

⁷²¹ Lucy Snowball, 'Diversion of Indigenous Juvenile Offenders' (Trends and Issues in Crime and Justice No 355, Australian Institute of Criminology, June 2008); Garth Luke and Bronwyn Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (Crime and Justice Bulletin No 69, Bureau of Crime Statistics and Research, Attorney General's Department of New South Wales, 2002).

⁷²² Australian Institute of Health and Welfare, 'Young People Aged 10–14 in the Youth Justice System 2011–12' (Juvenile Justice Series No 12, Australian Institute of Health and Welfare, 25 July 2013).

In Queensland, youth cautioning and conferencing is covered by the *Juvenile Justice Act 1992* (Qld). In Western Australia, juvenile cautioning and conferencing is under the *Young Offenders Act 1994* (WA). In South Australia, cautioning and family conferences occurs pursuant to the *Young Offenders Act 1993* (SA). In Western Australia, the Juvenile Pre-diversion Scheme operates under the *Youth Justice Act 2005* (WA) and the *Police Administration Act 1978* (WA). Tasmania's Youth Diversion Program operates in accordance with the *Youth Justice Act 1997* (Tas).

The South Australian Youth Court Diversion Program is based on the Magistrates Court Diversion Program and aims to assist youth suffering from mental impairment through brain injury, intellectual disability, mental illness, or personality or neurological disorder. This intervention provides an opportunity for youths to address mental health or disability needs and provides an alternative pathway for those young defendants who would otherwise qualify for a mental impairment defence in accordance with s 269 of the *Criminal Law Consolidation Act 1935* (SA).

FLRT could be assimilated into these existing programs with little disruption to the juvenile-offender rehabilitative efforts. Farrington and Welsh⁷²³ have found that there is growing proof that early programs for interventions are effective and successful. These findings in turn might imply the possibility of a coherent framework of neuroscientific intervention initiatives and options. Promotion of FLRT would also align with prevailing societal trends that favour rehabilitation for juvenile offenders over punishment and incarceration.⁷²⁴

⁷²³ David P Farrington and Brandon C Welsh, *Saving Children from a Life of Crime: Early Risk Factors and Effective Interventions* (Oxford University Press, 2007).

⁷²⁴ D S Nagin et al, 'Public Preferences for Rehabilitation Versus Incarceration Of Juvenile Offenders: Evidence From A Contingent Valuation Survey' (2006) 5 *Criminology & Public Policy* 627, 642.

5 Other Forms of Diversion

Many specific programs have been established by magistrates' courts, other government agencies, and private organizations. Most of these programs have an in-built drug/substance abuse treatment component.⁷²⁵

Miscellaneous mainstream court diversion programs include the following: the New South Wales Forum Sentencing and Court Referral of Eligible Defendants into Treatment (CREDIT); the Victorian Criminal Justice Diversion Program,⁷²⁶ Early School Leavers Pilot Program, Youth Justice Court Advice Service, and Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT); the Western Australian Intensive Supervision Program;⁷²⁷ and the Tasmanian Family Violence Offender Intervention Program (FVOIP). Again, these are all initiatives within which FLRT could be incorporated, or serve as an additive in the overall promotion of diversion for offender-rehabilitation.

F FLRT-Utility for Young Offenders

Adolescence is the distinct but transient period of development between childhood and adulthood that is characterized by increased experimentation and risk-taking, a tendency to discount long-term consequences, and heightened sensitivity to peers and other social influences.⁷²⁸ Neuroscientific evidence of significant changes in brain structure and function during adolescence strongly suggests that these cognitive tendencies of adolescents are associated with biological immaturity of the brain, and of the interactions of its constituent subsystems.⁷²⁹

⁷²⁵ Australian Institute of Health and Welfare, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, Australian Institute of Health and Welfare, December 2013) 8.

⁷²⁶ Pursuant to the *Magistrates' Court Act 1989* (Vic).

⁷²⁷ Pursuant to the *Young Offenders Act 1994* (WA).

⁷²⁸ See generally, National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (National Academies Press, 2013).

⁷²⁹ Owen D Jones et al, 'Law and Neuroscience: Recommendations Submitted to the President's Bioethics Commission' (2014) *Journal of Law and the Biosciences* 224, 230.

While juvenile offenders could exhibit interest in participating in fMRI neurofeedback due to its resemblance to a computer game,⁷³⁰ its efficacy may be compromised by the fact that the ‘prefrontal cortex does not fully develop until the early twenties, and this underlies the impulse behavior of teenagers’.⁷³¹ Furthermore, frontal lobes are also affected by synaptic pruning whereby ‘excess cortical synapses are gradually eliminated through childhood and adolescence in order to increase the efficiency of neuronal transmission’.⁷³² The frontal lobes are subject to synaptic pruning for longer periods than other parts of the brain. ‘Adolescents command different skills in decision making and impulse-control than do adults; a child’s brain is simply not like an adult’s brain.’⁷³³

In all States and Territories of Australia, there are specialized children’s courts that have jurisdiction over offences committed by young people. Except in Queensland, where the age limit is less than 17 years, the person must be less than 18 years old at the time of offence for trial by the children’s court. The courts may be constituted by a specialized children’s court magistrate or judge, or by a magistrate constituting a children’s court and exercising the powers under the relevant legislation. In most jurisdictions they are modified courts of summary jurisdiction with enlarged powers to deal with matters summarily.⁷³⁴ The children’s court may decide to dismiss the charge, divert the young person from further involvement in the system, or transfer them to other specialist courts such as drug or Aboriginal courts.

The function of ‘juvenile justice’ — a term referring to a State’s criminal justice responses to children who have allegedly committed an offence — in some jurisdictions resides within human services agencies, and is not viewed purely within a criminal justice

⁷³⁰ J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386.

⁷³¹ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 184.

⁷³² Walter Glannon, ‘The Limitations and Potential of Neuroimaging in the Criminal Law’ (2014) 18 *Journal of Ethics* 153, 159.

⁷³³ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 187; A A Baird and J A Fugelsang, ‘The Emergence of Consequential Thought: Evidence from Neuroscience’ (2004) 359 *Philosophical Transactions of the Royal Society of London B* 1797.

⁷³⁴ Australian Institute of Criminology, *Juvenile Court System* (11 November 2013) <http://www.aic.gov.au/criminal_justice_system/courts/juvenile.html>.

context. In New South Wales, the Department of Juvenile Justice is considered both a justice and a human services agency.⁷³⁵

1 *The Northern Territory*

Juvenile justice is the responsibility of the Northern Territory Police through the Pre-court Diversion Scheme and the Department of Justice, Correctional Services. If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following: dismiss the charge for the offence; discharge the youth without penalty; adjourn the matter for a period not exceeding six months and, if during that period the youth does not commit a further offence, discharge the youth without penalty; adjourn the matter to a specified date not more than 12 months from the date of the finding of guilt, and grant bail to the youth in accordance with the *Bail Act* (NT). For the purpose of assessing the youth's capacity and prospects for rehabilitation or allowing the youth to demonstrate that rehabilitation has taken place, the Court may order the youth to participate in a program approved by the Minister, as specified in the order, and adjourn the matter for that purpose.⁷³⁶ The Court may order that the youth be released on his or her giving security that he or she will appear before the Court if called on, and be of good behaviour for the period of the order, and observe any conditions imposed by the Court.⁷³⁷ The Court may alternatively fine the youth not more than the maximum penalty that may be imposed under the relevant law in relation to the offence;⁷³⁸ make a community work order that the youth participate in an approved project for the number of hours specified in the order.⁷³⁹

If the young person is bailed the Court can place him or her under the supervision of Correctional Services with conditions such as residence, curfew and attendance at

⁷³⁵ Australian Institute of Health and Welfare, 'Young People Aged 10–14 in the Youth Justice System 2011–12' (Juvenile Justice Series No 12, Australian Institute of Health and Welfare, 25 July 2013) 103.

⁷³⁶ *Bail Act* (NT) div 3.

⁷³⁷ *Ibid* div 4.

⁷³⁸ *Ibid* div 5.

⁷³⁹ *Ibid* div 6.

specific appointments. All young people placed on orders undergo case management whether on a community-based order or serving a term of detention.

2 *The Australian Capital Territory*

Responsibility for youth justice services in the Australian Capital Territory rests with the Office for Children Youth and Family Support within the Department of Disability, Housing and Community Services. The youth justice system is primarily administered under the *Children and Young People Act 1999* (ACT), which outlines the specific requirements for dealing with children and young people who offend. However, some provision is made for the sentencing of young people under the *Crimes (Sentencing) Act 2005* (ACT), which is primarily designed for the sentencing of adult offenders. Bail decisions for young people are made under the *Bail Act 1992* (ACT). Dispositions available to the court include dismissal of charge, reprimand, conditional discharge, fine, reparation or compensation order, probation order, community service order, attendance centre order, residential order, committal order (within the ACT or to another state institution), and good behaviour orders.

3 *Queensland*

The Department of Communities has responsibility for the provision of youth justice conferencing, youth justice services and programs within Queensland. Youth justice statutory responsibilities are prescribed under the *Juvenile Justice Act 1992* (Qld). The youth justice service centres provide supervisory, rehabilitative and re-integrative services to young people on community-based orders.

4 *New South Wales*

In New South Wales, the commencement, conduct and outcome of court proceedings against children alleged to have committed an offence and who are not diverted under the *Young Offenders Act 1997* (NSW) are governed principally by the *Children (Criminal*

Proceedings) Act 1987 (NSW). Section 33 of the *Children (Criminal Proceedings) Act* (NSW) permits the courts to make any of the following orders: a dismissal and/or caution, a good behaviour bond with or without supervision, a fine, referral to a youth justice conference, conditional or unconditional probation, a community service order, or an order that confines a young person to a period to detention. The main responsibilities of the Department of Juvenile Justice are the administration of youth justice conferences and the supervision of young offenders on community-based or custodial orders made by the courts. The Youth Drug and Alcohol Court operates in accordance with the *Children's Court Act 1987* (NSW), the *Children's (Criminal Proceedings) Act 1987* (NSW) and the *Bail Act 1978* (NSW). It can be seen that optimal FLRT-utilization extends not only to young offenders in an established diversionary setting, but also in regular youth court proceedings around Australia.

5 Victoria

The Victorian Juvenile Justice Program sits within the Department of Human Services and takes a strong diversionary approach to managing children and young people who enter the criminal justice system. This is reflected in the *Children and Young Persons Act 1989* (Vic) and in the manner in which children and young people are dealt with from the initial point of contact with the police through to completion of any order⁷⁴⁰ imposed by the court.

6 South Australia

The South Australian Youth Court has the same powers to sentence a youth for a summary offence as the Magistrates' Court, and the same powers in respect of an indictable offence as the District Court.⁷⁴¹ Generally, young offenders are treated more leniently than adults. The *Criminal Law (Sentencing) Act 1988* (SA) is generally applicable, except to the extent that the provisions of that Act conflict with specific

⁷⁴⁰ *Children and Young Persons Act 1989* (Vic) s 139(1).

⁷⁴¹ *Young Offenders Act 1993* (SA) s 22.

provisions of the *Young Offenders Act 1993*. Families SA is housed within the Department for Families and Communities and carries the statutory responsibility of managing orders made by the Youth Court.

7 *Western Australia*

Juvenile justice operations in Western Australia are primarily governed by the *Young Offenders Act 1994* (WA), the *Young Offenders Amendment Act 2004* (WA), the *Young Offenders Amendment Regulations 1995* (WA) and the *Children's Court of Western Australia Act 1988* (WA). Juvenile justice services fall under the Community and Juvenile Justice Division of the Department of Corrective Services. This Division covers adult community corrections and juvenile justice within the Community Justice Services Directorate and juvenile remand and detention services in the Juvenile Custodial Services Directorate. Should a juvenile offender be convicted and formally sentenced by the Children's Court, a number of sentencing options are available: no punishment, no punishment with conditions, no punishment with recognizance, fine, youth community-based order (with possible conditions of community work and therapeutic programs), intensive youth supervision order without detention (with possible conditions as above), intensive youth supervision order with detention/conditional release order (with possible conditions as above, and breach or reoffending while on the order can result in a custodial term being imposed at the magistrate's discretion), or custodial sentence usually followed by supervised release (juvenile parole).

8 *Tasmania*

Youth Justice in Tasmania is administered through the Department of Health and Human Services by the Youth Justice Services, Business Unit, which is part of the Human Services Group. The *Youth Justice Act 1997* (Tas) underpins the provision of services. A major emphasis of the Act is pre-court diversion and restoration or reparation of harm done in the community. Involvement of victims, parents, guardians and the community is

encouraged in order to improve individual resilience and community capacity to take responsibility and work in partnership to assist young people to rehabilitate in the community. The Magistrates' Court (Youth Justice Division) has a range of sentencing options, including fines, community conference, probation, community service orders, suspended detention, and detention. The Community Youth Justice Service has a supervision and management role for young offenders who either have a statutory order resulting from a court appearance or an obligation to perform that which was agreed to during a community conference.

G *FLRT-Utility in Youth Detention Centres*

Detention centres have three fundamental roles: to enhance community safety, to provide a safe and secure environment for detainees, staff and visitors, and to provide a structured environment that supports the rehabilitation of detainees through a strength-based approach to prepare them for reintegration into society and to reduce the risk of reoffending.⁷⁴² Access to FLRT could assist in the rehabilitation of incarcerated youths.

1 *The Northern Territory*

In the Northern Territory, youth justice case management is 'a collaborative process of assessment, intervention, planning, linking, facilitation, review and advocacy to provide clients and their families with the tools to improve their lives'.⁷⁴³ The youth justice case management process incorporates a plan of action to deliver programs that are likely to promote crime prevention, build safer communities and address the individual psychological, social and emotional well-being of the detainee. Detainees are assessed to gain an understanding of their skills, abilities and risk of reoffending.⁷⁴⁴

⁷⁴² Department of Correctional Services, *Programs and Services* (28 January 2015) <<http://www.correctionalservices.nt.gov.au/YouthJustice/programsandservices/Pages/default.aspx>>.

⁷⁴³ Department of Correctional Services, *Case Management* (29 January 2015) <<http://www.correctionalservices.nt.gov.au/YouthJustice/AliceSpringsYouthDetentionCentre/Pages/Case-management.aspx>>.

⁷⁴⁴ Ibid.

2 *The Australian Capital Territory*

A range of programs and interventions are delivered within the community and custodial environments to address the needs of young people. These include programs that focus on alcohol and other drug issues, relationship issues and educational needs. The Changing Habits and Reaching Targets (CHART) program, a cognitively based intervention designed to help young people to change their thinking and decision-making processes, is delivered in both the community and the Bimberi Youth Justice Centre. A range of partnerships also exist to assist young offenders that focus on the delivery of education, employment skills programs, post-release support, disability support, and health and mental health support.⁷⁴⁵

3 *Queensland*

The Aggression Replacement Training (ART) program targets medium-to-high-risk young people who exhibit aggressive and violent behaviour, and aims to reduce their risk of committing violent offences by teaching them social skills, anger-management techniques and moral reasoning. The CHART program is a structured individual intervention program for young people at a moderate-to-high risk of reoffending. The CHART program is also delivered to meet the cultural needs of Aboriginal and Torres Strait Islander young people. The Mater Family and Youth Counselling Service provides preparatory support and therapeutic interventions for young people, families and victims who are referred to a youth justice conference in relation to offences of a sexual nature.⁷⁴⁶

The Griffith Youth Forensic Service is a funded service that works with departmental caseworkers to provide specialized assessment and treatment programs for young sexual offenders, pre-sentence reports to facilitate court decisions, and treatment planning, consultancy and training services.

⁷⁴⁵ Australian Institute of Health and Welfare, *Youth Justice Supervision in the Australian Capital Territory* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/act/>>.

⁷⁴⁶ Australian Institute of Health and Welfare, *Youth Justice Supervision in Queensland* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/qld/>>.

4 *New South Wales*

‘Juvenile Justice NSW’ provides a range of programs and interventions within the community and custodial environments that are designed to address the needs of young people. These include counselling and group-work programs that focus on alcohol and other drug issues, and programs for sex offenders and violent offenders. Some examples of programs offered include: the Community/Custodial Services Intervention Framework and Framework for Programming, which helps staff to develop and deliver programs to tackle offending behaviour such as violent and aggressive behaviour, alcohol and drug misuse, the CHART program, a cognitive-based intervention designed specifically for caseworkers to engage and work with young people who require moderate-to-high intervention to reduce their risk of reoffending. ‘Juvenile Justice NSW’ has also developed a range of partnerships to assist young offenders. These include the delivery of education and health services within Juvenile Justice Centres, post-release support and employment skills programs, disability support, health and mental health support, and legal services.⁷⁴⁷

5 *Victoria*

A range of offence-specific programs are offered in Victoria. In addition to CHART, the Male Adolescent Program for Positive Sexuality (MAPPS) provides an intensive individual, group and family work-treatment program for adolescent males who have been found guilty of a sexual offence. MAPPS incorporates attitudinal and cognitive restructuring techniques, social skills training, relapse prevention, victim awareness, and education on sex and sexuality. The Adolescent Violence Intervention Program (AVIP) is targeted towards young people at moderate risk of violent behaviour and offending to develop skills to assist them to refrain from using violence. The Motor Vehicle Offending (MVO) Program is delivered to young people found guilty of motor vehicle offences.

⁷⁴⁷ Australian Institute of Health and Welfare, *Youth Justice Supervision in New South Wales* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/nsw/>>.

6 *South Australia*

A range of rehabilitation and support programs are offered to young people who are under the supervision of either the Community or Custodial Youth Justice. Examples of rehabilitation programs currently offered include Plus+, CHART, and the Drug and Alcohol Services South Australia (DASSA) program.

The PLUS+ program is an intensive, group-based, criminogenic treatment program based upon cognitive behavioural principles. The program is implemented by staff of Youth Justice Psychology Services who are the principal facilitators of the program. The primary objective of the program is to help young people acquire, develop and apply a series of social problem-solving, interpersonal, and self-control skills that will enable them to better manage potential difficulties in their lives, and to avoid future reoffending. Currently, the program is available to young people serving detention orders assessed as moderate-to-high risk of reoffending.

The DASSA Program is a psycho-educational, cognitive behavioural therapy, and motivational enhancement-based program for young people with alcohol and other drug misuse issues, and is suitable for males and females.

A range of developmental, health and social integration programs are also available across Youth Justice in South Australia, including 'Ignition', 'Beyond Art', 'Step Out', and 'Journey to Respect'.

The Ignition program is facilitated by Helping Young People Achieve (HYPA) and is designed to improve the social and independent living skills of young people. This program can also be a pathway to the Integrated Housing Exits Program, which provides young people with independent accommodation for 12 months with support from workers from HYPA. The Beyond Art program is also facilitated by HYPA, with an Art Therapist, and utilizes the medium of art to explore the topic of victim awareness.

The Journey to Respect program is facilitated by Child and Adolescent Mental Health Services (CAMHS) and targets young Aboriginal males aged 14–18 years old who have

committed, or are at risk of committing, violent offences towards older family members. The core aims of the program are to assist participants to identify and manage feelings of anger, sadness and shame, to deconstruct and explore the ideas of masculinity and how these can drive or shape violent and aggressive behaviour. The program also explores the concept of victim empathy and perspective-taking with the aim of reducing the incidence of family violence and, in particular, violence towards older family members.

In 2012, significant development occurred within Youth Justice Psychology Services (YJPS), with particular emphasis on providing treatment and rehabilitation for young offenders, integrated with case management services and supporting training centre operations. This also included clear promotion of a model of service delivery, articulating three key roles for psychologists in Youth Justice: the provision of clinical/forensic psychological assessments to assist case planning and case management, the delivery of individual therapeutic intervention and group-based rehabilitation programs, and consultation regarding behaviour support for residents of the Adelaide Youth Training Centre.

YJPS prioritizes young people who are at high risk of reoffending, and who have been convicted of serious offences. Individual offence-focused intervention may be provided for referred Youth Justice clients who have been convicted of violent, sexual or high-frequency repeat offending. YJPS intervention is specifically focused on addressing the underlying causes of a young person's offending behaviour, with the aim of reducing the likelihood of further offending.⁷⁴⁸

7 *Western Australia*

All educational and vocational programs that a young person engages in while in custody are aimed to be compatible with the young person's abilities and areas of interest. A young person can be referred to a variety of personal development and treatment programs, such as: Substance Misuse Education Program/Counselling (individual or

⁷⁴⁸ Australian Institute of Health and Welfare, *Youth Justice Supervision in South Australia* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/sa/>>.

group); PASH (Promoting Adolescent Sexual Health); Parenting Skills Program (for detainees who are parents or parents to be); Sex Offender Treatment (individual counselling with centre psychologist); Protective Behaviours/Domestic Violence Prevention Group; SAM-Save-A-Mate (preventative group programs); individual psychological counselling; and Personal Development Programs.

All programs are aimed at the rehabilitation and/or personal development of young people by providing them with the opportunity to engage in practical education, work, health, general life coping skills, and addressing the known issues related to the young person's offending behaviour. Psychologist-run therapeutic programs directly target the criminogenic factors related to a young person's offending behaviour and group programs facilitate change in attitudes and beliefs associated with offending behaviour.⁷⁴⁹

8 Tasmania

All young people at the Ashley Youth Detention Centre participate in a range of rehabilitative programs. The programs offered and techniques applied take place within a case-management context, are evidence-based and focus on offender-rehabilitation. The program framework is designed to provide cognitive-based therapeutic programs for persistent and serious offenders and address specific criminogenic and social needs. Basic interventions that address issues that may affect community integration, such as employment, education, accommodation and leisure, are also included.⁷⁵⁰

It is argued that the utility of FLRT is far-reaching, extending beyond MHDCts and the regular criminal justice system as detailed in Chapter 4. Broadening the jurisdictional utility of FLRT to encompass the Commonwealth, tribunals, and other diversionary schemes such as police, drug, indigenous-specific and young offender diversion and detention is a possibility that existing law and rehabilitative mechanisms could

⁷⁴⁹ Australian Institute of Health and Welfare, *Youth Justice Supervision in Western Australia* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/wa/>>.

⁷⁵⁰ Australian Institute of Health and Welfare, *Youth Justice Supervision in Tasmania* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/tas/>>.

reasonably accommodate. Incorporating FLRT into post-release programs for young offenders and adult offenders is addressed in the following section, as well as the utility of FLRT in adult custodial programs.

H *FLRT-Utility for Young Offenders Post-Release*

1 *The Northern Territory*

The aim of youth justice case management in the Northern Territory is to develop a structured plan that adheres to departmental objectives and best-practice principles, and identifies the detainee's goals while in detention and beyond. It should also address criminogenic risks and needs, as well as non-criminogenic needs, that impact on the detainee's well-being.⁷⁵¹

2 *The Australian Capital Territory*

The Bimberi Youth Justice Centre offers a number of initiatives in the Australian Capital Territory that aim to provide young people with the skills to assist in a successful transition back into the community. In addition, the Canberra Police Community Youth Club provides post-release support in a range of areas, including employment, training and education, recreation, and issues around family, relationships and peer association through their ReSET Program. The Government provides transition support through the Youth Support and Transition Team for young people leaving Bimberi who have been on long-term care orders and an education program focused on reintegration outcomes delivered by the Murrumbidgee Education and Training Centre at Bimberi.⁷⁵²

⁷⁵¹ Department of Correctional Services, *Case Management* (29 January 2015) <<http://www.correctionalservices.nt.gov.au/YouthJustice/AliceSpringsYouthDetentionCentre/Pages/Case-management.aspx>>.

⁷⁵² Australian Institute of Health and Welfare, *Youth Justice Supervision in the Australian Capital Territory* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/act/>>.

3 *Queensland*

In accordance with their assessed needs, young people in detention in Queensland are involved in a variety of programs, including therapeutic, educational, vocational, behavioural, life skills, cultural and recreational programs. These programs are regularly reviewed to ensure that they continue to meet the needs of the cohort in custody at that time. Transition officers, in partnership with Queensland Health and the Department of Education, Training and Employment, support young people exiting detention. As part of the transition-planning process, young people are referred to local community services to continue any programs they may have been receiving in detention.⁷⁵³

4 *New South Wales*

Juvenile Justice NSW provides pre- and post-release casework in collaboration with other agencies. The Joint Support Program supports young people released from custody in New South Wales by facilitating successful reintegration into their communities. Juvenile Justice NSW funds non-government organizations to provide post-release support in a range of areas, including accommodation, employment, training and education, income, recreation, and issues around family or relationships and peer association.⁷⁵⁴

5 *Victoria*

The Temporary Leave Program in Victoria supports the effective transition of young people from custody back into the community by promoting personal growth, skills development, behavioural and attitudinal change, and the adoption of appropriate, non-offending behaviours. ‘Temporary leave’ refers to a time-limited leave of absence from a Youth Justice centre for a young person who is serving a sentence. The Youth Residential

⁷⁵³ Australian Institute of Health and Welfare, *Youth Justice Supervision in Queensland* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/qld/>>.

⁷⁵⁴ Australian Institute of Health and Welfare, *Youth Justice Supervision in New South Wales* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/nsw/>>.

Board and Youth Parole Board have responsibility for all young people sentenced to detention in a Youth Justice custodial centre and those transferred by the Adult Parole Board to such a centre, and aim to balance the needs of the young person with community safety considerations.⁷⁵⁵

6 *South Australia*

Pre- and post-release programs for young people detained in the Training Centres in South Australia focus on providing a range of education, training and vocational opportunities, with a strong through-care approach with community linkages. Education programs, both in the Training Centre and in the community, particularly emphasize literacy and numeracy as base skills, but also include a balanced curriculum offering art, life skills, health, physical education, woodwork and metalwork. Vocational courses accredited by the South Australian Certificate of Education are also offered and include hospitality, dry wall construction, and music.

A large number of case-managed Innovative Community Action Networks courses and programs are also offered to young people released from training centres, all of which foster engagement, capacity and pathways to employment.⁷⁵⁶ ‘Step Out’ is a mentoring program funded by Australian Red Cross. It aims to support young people who are currently, or who have previously been, in custody to articulate their goals, reconnect with their community, and pursue positive lifestyles that minimize future risk of reoffending. Young people involved in the program commence working with mentors while in custody and continue into the community for up to 12 months.

7 *Western Australia*

⁷⁵⁵ Australian Institute of Health and Welfare, *Youth Justice Supervision in Victoria* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/vic/>>.

⁷⁵⁶ Australian Institute of Health and Welfare, *Youth Justice Supervision in South Australia* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/sa/>>.

Upon release from detention in Western Australia, a young person can be referred to a number of programs in order to assist with their rehabilitation in the community, and also to prevent reoffending.⁷⁵⁷ Youth Justice Officers provide support to young people exiting detention on Supervised Release Orders. As part of a release plan, referrals to programs similar to those available in custody are implemented. These include Substance Misuse Education Program/Counselling (individual or group); PASH (Promoting Adolescent Sexual Health); Parenting Skills Program (for detainees who are parents or parents to be); Sex Offender Treatment (individual counselling with centre psychologist); Protective Behaviours/Domestic Violence Prevention Group; SAM-Save-A-Mate (preventative group programs); individual psychological counselling; and Personal Development Programs.

8 *Tasmania*

In Tasmania, youth workers support young people in their transition from the Ashley Youth Detention Centre (AYDC) into the community. Save the Children work in partnership with the AYDC, Ashley School, Youth Justice, PCYC, EdZone, and the Department of Education to support young people to identify and meet their recreational, educational and vocational and/or employment goals and aspirations.⁷⁵⁸

I *FLRT-Utility in Custodial Programs*

There exists a need for correctional agencies to deliver services and programs that can assist prisoners to lead productive and law-abiding lives upon their release into the community.⁷⁵⁹ Whereas international research has shown that offender-rehabilitation

⁷⁵⁷ Australian Institute of Health and Welfare, *Youth Justice Supervision in Western Australia* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/wa/>>.

⁷⁵⁸ Australian Institute of Health and Welfare, *Youth Justice Supervision in Tasmania* (2015) <<http://www.aihw.gov.au/youth-justice/states-territories/tas/>>.

⁷⁵⁹ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 2.

programs are likely to be most effective when offered in community settings, a robust body of evidence now exists testifying to the rehabilitative success of many custody-based programs.⁷⁶⁰

All jurisdictions deliver cognitive skills programs in custodial environments,⁷⁶¹ and many different types of offender-rehabilitation programs are offered in Australian public prison settings. These include cognitive skills, drug and alcohol, anger-management, violent offender, domestic violence, and sex offender programs, as well as those programs that are delivered to other groups, including Indigenous and female offenders.⁷⁶²

The *Standard Guidelines for Corrections in Australia*⁷⁶³ set out minimum requirements for prisons in relation to prisoner case management. For example:

Each administering department should administer a system of individual case management of prisoners that enables the assessment, planning, development, co-ordination, monitoring and evaluation of options and services to meet the individual needs and risks of persons as they move between community corrections and prisons.⁷⁶⁴

These guiding principles are intended to show the spirit in which correctional programs should be administered, and the goals toward which administrators should aim. However, no systematic approach exists to service delivery in Australian correctional services for other groups with special needs (for example, those with acquired brain injury, mentally disordered offenders, other minority culture groups).⁷⁶⁵

⁷⁶⁰ D A Andrews and J Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16 *Psychology, Public Policy and Law* 39.

⁷⁶¹ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 24.

⁷⁶² Ibid 13.

⁷⁶³ Corrective Services Ministers' Conference, 'Standard Guidelines for Corrections in Australia' (Corrections, Prisons and Parole, 2012).

⁷⁶⁴ Ibid 3.1.

⁷⁶⁵ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 30.

Prison-based offender-rehabilitation programs for adult offenders have a therapeutic (cognitive-behavioural) model of intervention that are underpinned by the RNR principles derived from the work of Andrews and Bonta,⁷⁶⁶ as elaborated in Chapter 3.

Ross and Fabino⁷⁶⁷ first argued that offending behaviour may be linked to inadequate thinking skills (interpersonal problem-solving, moral reasoning, cognitive style, self-control and perspective-taking), and that some of the most effective offender treatment programs involve an element of training in these areas. The past two decades has seen cognitive skills training become a core feature of offender-rehabilitation in the United Kingdom, the United States of America, Canada and, more recently, Australia. These programs employ cognitive behavioural treatment methods to improve decision-making and problem-solving, self-regulation and moral-reasoning skills.⁷⁶⁸

Generally it would appear that program completion is associated with reductions in recidivism one year post release, but may not be maintained over longer timeframes. Cognitive skills programs have also been reported to have a short-term positive impact on institutional behaviour.⁷⁶⁹ Ward and Nee⁷⁷⁰ argue that there is a need to further develop the theoretical rationale for cognitive skills programs and, in turn, include the concepts of rationality, emotion, distributed cognitive and embodiment to conceptualize further the relationship between cognitive skills and action. FLRT may be valid treatment additive to existing custodial rehabilitation programs as detailed below.

⁷⁶⁶ D A Andrews and J Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16 *Psychology, Public Policy and Law* 39.

⁷⁶⁷ R R Ross and E A Fabiano, *Time to Think: A Cognitive Model of Delinquency Prevention and Offender Rehabilitation* (Air Training and Publications, 1985).

⁷⁶⁸ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 23.

⁷⁶⁹ A Clarke, R Simmonds and S Wydall, 'Delivering Cognitive Skills Programs in Prison: A Qualitative Study' (Home Office Research Finding No 242, London Home Office, 2004).

⁷⁷⁰ T Ward and C Nee, 'Surfaces and Depths: Evaluating the Theoretical Assumptions of Cognitive Skills Programs (2009) 15 *Psychology, Crime and Law* 165.

1 *The Northern Territory*

The Northern Territory Department of Correctional Services is implementing and delivering new initiatives and rehabilitation programs aimed at reducing the Northern Territory's imprisonment rate by 15–20 per cent and the reoffending rate by 10 per cent.⁷⁷¹ A program called 'Cognitive Skills' is offered.⁷⁷²

2 *The Australian Capital Territory*

In the Australian Capital Territory, Offender Intervention Program Unit Specific treatment components include individual and group counselling, alcohol and other drug education, relapse prevention and cognitive skill-building activities designed to address risk factors. Areas of treatment include socialisation in terms of developing attitudes and values of a mainstream, pro-social lifestyle, and the development of drug-free networks.⁷⁷³ 'Cognitive Self Change' is the name of one relevant program.⁷⁷⁴

The pre-release Transitional Release Centre (TRC) is another service that is designed to assist prisoners in their rehabilitation. It has a valuable place in the rehabilitation, reintegration and resettlement of prisoners. It provides opportunities for prisoners to establish or re-establish support systems in the community, such as group-living, budgeting and cooking. This expands the opportunities available to prisoners to exercise appropriate discretion and decision-making. The TRC concentrates on life skills and

⁷⁷¹ Department of Correctional Services, *Rehabilitation and Indigenous Initiatives* (18 December 2012) <<http://www.correctionalservices.nt.gov.au/RehabilitationAndIndigenousInitiatives/Pages/default.aspx>>.

⁷⁷² Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

⁷⁷³ J Hargreaves, 'Beyond Rehab: Where Does the Prison Fit? (2009) 21 *Current Issues in Criminal Justice* 148.

⁷⁷⁴ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

programs that enhance prisoners' prospects of restoring and maintaining the family unit, finding employment, and generally re-adjusting to life in the community.⁷⁷⁵

3 *Queensland*

In Queensland, the Agency also offers offenders access to several cognitive-behavioural-based intervention programs that target offending behaviours and anti-social thinking. These cognitive-behavioural based programs, such as 'Making Choices',⁷⁷⁶ are designed to assist offenders to confront and understand their past criminal behaviour, and to develop pro-social skills and techniques to control their behaviour and avoid situations that may lead to further offending when released from supervision or custody.⁷⁷⁷ There are also several programs for those convicted of sexual offences, including a specialized program for intellectually disabled offenders.⁷⁷⁸

4 *New South Wales*

In New South Wales, Corrective Services delivers professional correctional services and programs to reduce the risk of reoffending and enhance public safety.⁷⁷⁹ One function of Offender Services and Programs is to provide rehabilitation programs and psychological services for offenders in custody and in the community.⁷⁸⁰ Offenders are assessed in order to develop a case plan, which is 'a goal-oriented pathway [with] activities and interventions that aim to increase the likelihood that a person will lead a life without

⁷⁷⁵ J Hargreaves, 'Beyond Rehab: Where Does the Prison Fit? (2009) 21 *Current Issues in Criminal Justice* 148.

⁷⁷⁶ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

⁷⁷⁷ Queensland Corrective Services, 'Rehabilitation — Custodial Operations' (19 August 2005) <http://www.correctiveservices.qld.gov.au/About_Us/The_Department/Rehabilitation/#cust>.

⁷⁷⁸ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 16.

⁷⁷⁹ New South Wales Government, *Corrective Services New South Wales* (3 September 2015) <<http://www.correctiveservices.justice.nsw.gov.au/programs/offender-services-and-programs>>.

⁷⁸⁰ Ibid.

harming others or themselves'.⁷⁸¹ A cognitive skills program is 'Think First'.⁷⁸² Readily available on the Corrective Services website is access to a compendium of assessments employed by Corrective Services NSW.⁷⁸³ The instruments listed include psychological and psychometric tests. Relevantly, the eleventh version of the Barratt Impulsiveness Scale (BIS-11) is included under the 'Criminogenic Needs and Offence Related Assessments'.⁷⁸⁴ An accepted measure of impulsiveness,⁷⁸⁵ the BIS-11 is the most widely used self-report measure of impulsive personality traits.⁷⁸⁶ It includes 30 items that are scored to yield six first-order factors (attention, motor, self-control, cognitive complexity, perseverance, and cognitive instability impulsiveness), and three second-order factors (attentional, motor, and non-planning impulsiveness).⁷⁸⁷

Statewide Disability Services addresses the additional support needs of offenders with disabilities. Mental illness is not considered a disability for these purposes.⁷⁸⁸ It is a multidisciplinary team that works with all offenders with a disability, whether in custody or in the community. It provides: assessments, behaviour management, program facilitation support, consultation and advice to staff managing offenders with a disability, development of programs for offenders with a disability to address their offending behaviour, and advice and consultation to internal and external stakeholders, ensuring

⁷⁸¹ Ibid.

⁷⁸² Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

⁷⁸³ New South Wales Government, *Corrective Services New South Wales* (3 September 2015) <<http://www.correctiveservices.justice.nsw.gov.au/programs/offender-services-and-programs>>.

⁷⁸⁴ New South Wales Government, *Corrective Services Justice* (3 September 2015) <http://www.correctiveservices.justice.nsw.gov.au/__data/assets/pdf_file/0009/436761/compendium-of-assessment-partical-accessible.pdf 30>.

⁷⁸⁵ J H Patton, M S Stanford, MS and E S Barratt, 'Factor Structure of the Barratt Impulsiveness Scale' (1995) 51 *Journal of Clinical Psychology* 768.

⁷⁸⁶ Ibid.

⁷⁸⁷ Ibid.

⁷⁸⁸ To be eligible for service from Statewide Disability Services an offender must have one or more of the following disabilities: Intellectual Disability or Low Cognitive Functioning; Acquired Brain Injury (including traumatic brain injury and alcohol/drug related brain injury); Autism Spectrum Disorder (Autism or Aspergers); Dementia; Sensory Disability (Hearing or Vision Impairment); Physical Disability; or Frail Aged as stated in New South Wales Government, *Statewide Disability Services New South Wales* (3 September 2015) <<http://www.correctiveservices.justice.nsw.gov.au/programs/offender-services-and-programs>>.

that issues impacting offenders with disability are adequately addressed via policy and procedure.⁷⁸⁹

Statewide Disability Services focuses on the pre-release planning of offenders with an intellectual disability, which includes making referrals to Ageing Disability and Home Care including the Community Justice Program and other disability related community service providers.⁷⁹⁰ There are also sex offender programs for offenders with an intellectual disability.⁷⁹¹

5 Victoria

For individuals entering the Victorian prison system, Corrections Victoria has developed a number of targeted interventions aimed at maximizing rehabilitation opportunities for offenders and minimizing their risk of reoffending.⁷⁹² Case management is a vital component of the prisoner rehabilitation and reintegration process.⁷⁹³ Cognitive skills programs offered include, 'Maintaining Change', 'Exploring Change', 'Cognitive Skills' and 'Making Choices'.⁷⁹⁴ There is also a sex offender program for offenders with a cognitive disability.⁷⁹⁵

⁷⁸⁹ New South Wales Government, *Statewide Disability Services New South Wales* (3 September 2015) <<http://www.correctiveservices.justice.nsw.gov.au/programs/statewide-disability-services>>.

⁷⁹⁰ Ibid.

⁷⁹¹ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 16.

⁷⁹² Deborah Glass, 'Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria' (Discussion Paper, Victorian Ombudsman, October 2014) 11.

⁷⁹³ Ibid 13.

⁷⁹⁴ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

⁷⁹⁵ Ibid 16.

6 *South Australia*

The South Australian Department for Correctional Services strives to deliver an integrated and seamless approach in the delivery of programs and services for sentenced prisoners and offenders, from initial to final contact with the department. This approach, called Integrated Offender Management, provides for the dynamic and culturally appropriate management and rehabilitation of prisoners and offenders.⁷⁹⁶ For example, one program offered, ‘Making Choices’,⁷⁹⁷ is designed to assist male and female offenders in adopting an offence-free lifestyle. The program aims to increase participants’ understanding of what led them to offending and to understand points where different choices could have been made.

The Department for Correctional Services currently offers a number of education programs that are available for those people subject to supervised bonds and which are designed to address the criminogenic needs of offenders. The programs available are: cognitive skills, alcohol and other drugs, literacy and numeracy, anger management, victim awareness, domestic violence and sex offender treatment.⁷⁹⁸

7 *Western Australia*

In Western Australia, a specific offence-focused intensive cognitive skills program has been developed for use with female offenders. The Western Australian Department of Corrective Services conducts ‘a range of programs and interventions which target offending behaviour’⁷⁹⁹ and assists participants to ‘get their lives back on track by better

⁷⁹⁶ Department for Correctional Services South Australia, *Correctional Programs* (2010) <<http://www.corrections.sa.gov.au/rehabilitation-programs>>.

⁷⁹⁷ Karen Heseltine, Andrew Day and Rick Sarre, ‘Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia’ (Report No 112, Australian Institute of Criminology, 2011) 25.

⁷⁹⁸ Legal Services Commission South Australia, *Law Handbook* (2015) <<http://www.lawhandbook.sa.gov.au/>>.

⁷⁹⁹ Department of Corrective Services Western Australia, *Cognitive Skills* (18 October 2013) <<https://www.correctiveservices.wa.gov.au/rehabilitation-services/rehab-programs.aspx#Cognitive-skills>>.

understanding their offending behaviour and learning new ways to avoid reoffending'.⁸⁰⁰
Cognitive skills programs include 'Cognitive Brief Intervention' and 'Think First'.⁸⁰¹

The Directorate's Disability Services Unit focuses upon services and support for prisoners with intellectual disabilities, acquired brain damage, dementia or cognitive impairment. The unit also provides advice to staff, prisoners, guardians, advocates and external agencies relating to services and policies for people with these disabilities.⁸⁰²
'Legal and Social Awareness'⁸⁰³ is a cognitive skills program available to intellectually disabled persons.

8 *Tasmania*

In Tasmania, anecdotal evidence exists to suggest that motivation/preparatory programs promote the likelihood of intensive program completion.⁸⁰⁴ The Integrated Offender Management model operates in Tasmania also. Focusing on reducing reoffending through case management and reintegration, it is in keeping with the rehabilitation goals of the department in the area of offender management. Tasmania also offers the 'Making Choices' program.⁸⁰⁵

⁸⁰⁰ Ibid.

⁸⁰¹ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011) 25.

⁸⁰² Ibid 72.

⁸⁰³ Ibid 25.

⁸⁰⁴ Ibid 26.

⁸⁰⁵ Ibid 25.

There is ample evidence worldwide that those leaving prison face significant challenges reintegrating into the community.⁸⁰⁶ A recent Australian study⁸⁰⁷ of people released from prison found that most participants encountered a number of difficulties when attempting to reintegrate into the community. FLRT could be implemented as a form of post-release support, in addition to the current initiatives detailed below.

1 *The Northern Territory*

Post-Release Supported Accommodation (P-RSA) has been established in the Northern Territory, focusing on four key areas: employment, education and training, accommodation, and living skills. Residents are assisted with creating community networks for continuity of support, restoring family and community relationships, and confronting any issues that may impact on their rehabilitation. Generally, P-RSA is available to all prisoners who have been released upon completion of a full sentence and to those released on orders under the supervision of Community Corrections.⁸⁰⁸

2 *The Australian Capital Territory*

In the Australian Capital Territory, the Transitional Release Centre (TRC) has been constructed ‘outside the wire’ as a halfway house for detainees who are completing their sentences and are due for release and have met certain stringent criteria. Generally,

⁸⁰⁶ Deborah Glass, ‘Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria’ (Discussion Paper, Victorian Ombudsman, October 2014) 23.

⁸⁰⁷ Louis Schetzer and StreetCare, ‘Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis’ (Report, Public Interest Advocacy Centre, June 2013).

⁸⁰⁸ Department of Correctional Services Northern Territory, *Post-Release Supported Accommodation* (18 December 2012) <<http://www.correctionalservices.nt.gov.au/RehabilitationAndIndigenousInitiatives/PostReleaseSupportedAccommodation/Pages/default.aspx>>.

detainees accommodated in the TRC will have commenced work experience in the community, which they attend daily.⁸⁰⁹

3 *Queensland*

Offender Reintegration Support Service (ORSS)⁸¹⁰ provides eligible high-needs offenders with individually tailored reintegration support during their transition from custody into the community.

4 *New South Wales*

The Transitional Support Program in New South Wales provides support and case management to men and women transitioning from prison to the wider community. Transitional workers meet with clients approximately three months before release to identify post-release needs. These needs generally include accommodation, employment, welfare, drug and alcohol, debt, relationships and adjusting to life on the outside. Transitional workers support clients for up to a year through the stressful transition period, with the goal of clients establishing themselves in their community, thereby reducing the likelihood of reoffending and returning to prison.⁸¹¹

5 *Victoria*

The main form of support for people post-release in Victoria is through Intensive Transitional Support Programs funded by Corrections Victoria. These programs are delivered by non-government service providers, per prisoner on a set-number-of-hours

⁸⁰⁹ Australian Capital Territory Corrective Services, *Transitional Release Centre* (29 March 2012) <<http://www.cs.act.gov.au/page/view/863/title/transitional-release-centre>>.

⁸¹⁰ Queensland Corrective Services, *Procedure — Reintegration Support* (2015) <http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmproreintsupportcopy.shtml>.

⁸¹¹ Community Restorative Centre, *Transitional Alcohol and Other Drugs Project* (2015) <<http://www.crcnsw.org.au/services/transitional>>.

basis, with prisoners being assigned a worker. Those eligible for the programs meet the following criteria: have served a sentence (not for those on remand); are at an increased risk of reoffending; have multiple and complex transitional needs; are willing to participate voluntarily and be actively involved.⁸¹²

6 *South Australia*

Offenders Aid and Rehabilitation Services (OARS) Community Transitions in South Australia is an innovative non-government Crime Prevention Agency.⁸¹³ OARS Community Transitions provides services to many people, including those released from prison, their partners and their children. The agency pursues early intervention strategies with respect to preventing crime and is represented on many external bodies and Government Committees.

7 *Western Australia*

The Re-entry Link Program in Western Australia is a voluntary program to help prisoners improve their life skills, prepare for release, find somewhere to live and link up with job network providers, family and community support services. This service operates in every prison across the State.⁸¹⁴

8 *Tasmania*

The Case Coordination Unit is responsible for assessing prisoners, advising correctional case officers about sentence plans, and assisting sentenced prisoners to prepare for release into the community. A Reintegration and Transition Consultant works with community

⁸¹² Deborah Glass, 'Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria' (Discussion Paper, Victorian Ombudsman, October 2014) 23.

⁸¹³ Offenders Aid and Rehabilitation Services, *Community Transitions* (2011) <<http://www.oars.org.au/index.html>>.

⁸¹⁴ Department of Corrective Services Western Australia, *Getting Out* (27 May 2013) <<https://www.correctiveservices.wa.gov.au/prisons/getting-out.aspx>>.

organizations to provide reintegration support pre- and post-release. This position also works with the community to provide additional services to inmates while in prison.⁸¹⁵

V CONCLUSION

This chapter has advanced the argument for diversifying the therapeutic practice of FLRT by widening its jurisdictional ambit. The utility of FLRT as part of court-mandated rehabilitative treatment, rather than full diversion, for major indictable offences in superior courts was addressed. The use of FLRT in tribunals that assess the continued detention of both civilly committed and forensic patients, as well as those that determine issues of mental responsibility, were also considered. It was proffered that optimal FLRT-utilization may extend to other diversionary schemes, including police diversion, drug diversion and indigenous-specific diversionary programs. Youth offenders may also benefit from FLRT — in a diversionary capacity, as well as in-detention and post-release. The value of FLRT in adult custodial programs and post-release programs was also promoted.

The compatibility of FLRT with the GLM of offender-rehabilitation was established in Chapter 3, as well as the formalities of FLRT becoming a recognized rehabilitative treatment. Consideration of FLRT-integration into existing court-mandated opportunities for offering rehabilitation through mental health diversionary mechanisms and the regular criminal justice system in each State and Territory in Australia was explored in Chapter 4, and suggestions for its optimal integration have been elaborated upon in this chapter. It follows that the next chapter, Chapter 6, will consider the theoretical implications of FLRT-integration within traditional and modern conceptions of punishment and rehabilitation.

⁸¹⁵ Department of Justice, *Integrated Offender Management* (24 September 2014) <<http://www.justice.tas.gov.au/prisonservice/iom>>.

CHAPTER 6

THE JURISPRUDENTIAL PERMISSIBILITY OF INTEGRATING FLRT INTO THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

I INTRODUCTION

To this point, the thesis has considered FLRT-utilization within the existing legal framework in Australia — both within diversionary mechanisms and the regular criminal justice system. The thesis then proceeded to argue the plausibility of FLRT as an adjunct treatment to the various offender-rehabilitative treatments operative within each State and Territory of Australia. Two significant questions remain to be addressed: first, what are the theoretical implications of integrating FLRT into the Australian criminal justice system? Secondly, what are the practical implications of doing so?

This chapter addresses the first of those questions. This requires, first, a consideration of how integrating customized rehabilitation for impulse-control management would fit within traditional conceptions of punishment. This will in turn include an assessment of historical and modern conceptions of punishment, with specific regard to retributivism and utilitarianism.

Secondly, the compatibility of the adversarial system with criminal law is also examined in this chapter. This is in contrast to the reduced condemnatory emphasis inherent in non-adversarial systems, where therapeutic jurisprudence flourishes. Treating an offender within parameters traditionally established for the punitive ideal, it is argued, is problematic. Analysis of offender attitude, rather than the nature of the crime, is considered.

Thirdly, rehabilitation theory and recidivism-reduction as theoretical impetuses to the scholarship of therapeutic jurisprudence are also considered, as is the relevance of

international human rights theory and obligations to FLRT as a rehabilitative treatment for criminal offenders. Particular weight is given to the framework for applying human rights to correctional practice (in offender assessment and treatment), as developed by Ward and Birgden,⁸¹⁶ and its relevance to the strength-based approach to offender-rehabilitation, the GLM, as established in Chapter 2. The productive interaction of human rights theory with the therapeutic jurisprudence agenda in the promotion of socially acceptable and personally meaningful lives for offenders is also addressed.

Fourthly, ethical considerations surrounding FLRT are examined in the light of President Obama's charge to the Presidential Commission for the Study of Bioethical Issues Bioethics Commission⁸¹⁷ to identify core ethical standards in the area of neuroscience. Matters surrounding misrepresentations and unjustified inferences that can be drawn from neuroscientific evidence are raised.

Fifthly, other theoretical concerns are enumerated, including the relevance of the rule of law and, more specifically, the notion of equality before the law. The balancing of FLRT as a therapeutic treatment with the maintenance of 'principled faithful application of the law'⁸¹⁸ is deliberated.

The next chapter, Chapter 7, addresses the second remaining question. This requires a consideration of the practical implications of FLRT-integration into the criminal justice system, including, inter alia, the role of lawyers and judges acting in a therapeutic context, the impact of therapeutic jurisprudence concepts upon judicial integrity, as well as the limitations of fMRI equipment. It could fairly be argued that some of the material in Chapter 7 properly belongs in the present chapter. However, it can be difficult to disentangle theoretical jurisprudential matters from some of the practical considerations

⁸¹⁶ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628.

⁸¹⁷ Presidential Commission for the Study of Bioethical Issues, *Presidential Charge to the Commission for the Study of Bioethical Issues* (1 July 2013) <<http://bioethics.gov/sites/default/files/news/Charge%20from%20President%20Obama.pdf>>.

⁸¹⁸ Joseph Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Clarendon Press, 1994) 373.

surrounding FLRT-integration in the present context. Accordingly, the burden of analysis is spread across two chapters simply to achieve balance in the coverage of each chapter.

It is ultimately concluded that the theoretical and practical implications of FLRT-integration into the criminal justice system — while challenging established rule-of-law principles and natural justice tenets — do not ‘run afoul’⁸¹⁹ of the law to the extent that a conceptual upheaval would result. Existing legal principles make virtually no assumptions about the neural bases of criminal behaviour, and as a result they can comfortably assimilate new neuroscientific insights:⁸²⁰ FLRT-integration is not an additive for which the law is fundamentally unprepared.

II THE CONCEPT OF PUNISHMENT

Punishment has been described as ‘the authoritative imposition of something regarded as unpleasant to someone who has committed a breach of rules.’⁸²¹ Theories of punishment can be divided into two general philosophies: retributivist and utilitarian. Under the retributivist theory, offenders are punished for criminal behaviour because they deserve punishment. Criminal behaviour upsets the peaceful balance of society, and punishment assists to restore the balance. The retributivist theory focuses on the crime itself as the reason for imposing punishment. While the utilitarian theory looks forward by basing punishment on the perceived resultant social benefits, the retributivist theory looks backward at the transgression as the basis for punishment. Each theory of punishment will now be considered in turn.

⁸¹⁹ Mae C Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 572.

⁸²⁰ Joshua Greene and Jonathan Cohen, ‘For the Law, Neuroscience Changes Nothing and Everything’ (2004) 359 *Philosophical Transactions Of The Royal Society Of London: Biological Sciences* 1775, 1775.

⁸²¹ Richard Stanley Peters, *Ethics and Education* (Allen and Unwin, 1966) 267.

A *The Retributivist Theory of Punishment*

[P]unishment should be an end in itself.⁸²²

The modern debate about punishment revolves around the primacy of four components: retribution, deterrence, incapacitation and rehabilitation. In the late 1700s, philosopher Immanuel Kant⁸²³ constructed a philosophy of retribution, giving a rational foundation to the accepted retributinal basis of all punishment.⁸²⁴ He argued that the leading goal of criminal law must be retribution. Kant's view was that to punish the criminal defendant as a means to any other utilitarian goal, such as deterrence or rehabilitation, was to de-humanize the defendant by reducing him to a mere object.⁸²⁵ Moreover, Kant viewed punishment as a purely retributive reaction to the crime itself; therefore, the punishment had to be proportionate to the crime.⁸²⁶ Philosopher Georg Hegel concurred with Kant's retributionist ideal, adding the notion that punishment annulled the crime.⁸²⁷ In Hegel's construct, crime is the negation of moral law, and punishment is necessary to negate that negation to restore the moral right.⁸²⁸ Hegel continued the Kantian view that criminals themselves are moral beings, entitled to have their crimes negated by proportionate punishment.

The idea of punishment as moral retribution may have its roots in what some anthropologists have called 'defilement' — the process by which primitive societies interpreted and explained human suffering as punishment by the gods.⁸²⁹ Italian jurist Cesare Beccaria is generally credited with the first systematic exposition of

⁸²² Immanuel Kant, *The Metaphysical Elements of Justice* (Ladd trans, Hackett, 2nd ed, 1999) [trans of: *Die Metaphysik der Sitten* (first published 1797)].

⁸²³ Immanuel Kant, *The Metaphysical Elements of Justice* (Ladd trans, Hackett, 2nd ed, 1999) [trans of: *Die Metaphysik der Sitten* (first published 1797)].

⁸²⁴ Ibid.

⁸²⁵ Ibid.

⁸²⁶ Ibid.

⁸²⁷ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (T M Knox trans, Oxford University Press, 1942) [trans of: *Grundlinien der Philosophie des Rechts* (first published 1821)].

⁸²⁸ Ibid.

⁸²⁹ Paul Ricoeur, *The Symbolism of Evil* (Emerson Buchanan trans, Harper and Row, 1967) [trans of: *La symbolique du mal* (first published 1960)] 26–7.

proportionality.⁸³⁰ He believed that requiring criminal sentences to be proportionate to the crime was an important limitation on the powers of government.⁸³¹ Thus, retribution achieved an important philosophical structure as the basis for proportionality — the governing principle of penal distribution.

B *The Utilitarian Theory of Punishment*

The retributionist paradigm continued until the 1800s, when it was challenged by English utilitarian Jeremy Bentham.⁸³² The utilitarian theory of punishment seeks to punish offenders in order to discourage, or deter, future wrongdoing. Under the utilitarian philosophy, laws should be used to maximize the happiness of society. Because crime and punishment are inconsistent with happiness, they should be kept to a minimum. Utilitarians understand that a crime-free society does not exist, but they endeavour to inflict only as much punishment as is required to prevent future crimes. The utilitarian theory is consequentialist in nature. Consequentialist responses to crime justify punishment ‘based on their ability to prevent repeat and future crimes and promote specific public policy objectives’.⁸³³ Utilitarian theory recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil. In other words, punishment should not be unlimited.

Utilitarians deem that the only purpose of punishment was to prevent crime, that is, to be a deterrent.⁸³⁴ Deterrence operates on a specific and a general level. General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, signaling to others that criminal behaviour will be punished.

⁸³⁰ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (T M Knox trans, Oxford University Press, 1942) [trans of: *Grundlinien der Philosophie des Rechts* (first published 1821)].

⁸³¹ Ibid.

⁸³² Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830).

⁸³³ M R Fondacaro and M J O’Toole, ‘American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime’ (2015) *New Criminal Law Review* (forthcoming) 7.

⁸³⁴ Ibid.

Specific deterrence means that the punishment should prevent the same person from committing crimes in the future. Specific deterrence works in two ways. First, an offender may be imprisoned so as to physically prevent him or her from committing another crime for a specified period. Second, the incapacitation is designed to be so unpleasant that the offender is discouraged from repeating the criminal behaviour.

Rehabilitation is another utilitarian rationale for punishment. The goal of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency and chronic violent behaviour. Rehabilitation also includes the use of educational programs, providing offenders with the knowledge and skills needed to compete in the job market.

Naturally, if punishment is viewed as a utilitarian tool to deter future illegal behaviour of potential criminals, then it can also be used, though less efficiently, to shape the behaviour of the particular defendant being punished. Not only would punishment deter the offender from engaging in future crimes, it could also change the offender. The birth of the ‘rehabilitative ideal’ thus commenced as an extension of the deterrence model.

Uncoupled to any concept of proportionality, the primary theoretical failure of the rehabilitative ideal was that it invested in the state unchecked powers to ‘cure’, which were unrelated to any notions of criminal responsibility and fundamental justice.⁸³⁵ The modest goals of punishment as a just desert, and prevention as the simple act of taking criminals out of society, replaced rehabilitation as the dominant penal theory.⁸³⁶ Modern criminologists acknowledge that each of the four traditional justifications for punishment — retribution, deterrence, rehabilitation and incapacitation — must continue to play some

⁸³⁵ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous’ (2002) 29 *Fordham Urban Law Journal* 2063, 2079.

⁸³⁶ See Marvin Frankel, *Criminal Sentences: Law Without Order* (Hill and Wang, 1973); Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976); Richard G Singer, *Just Deserts: Sentencing Based on Equality and Desert* (Ballinger Publishing, 1979).

role in the criminal justice system.⁸³⁷ However, synthesising these justifications into a cohesive system is challenging, primarily because of the incompatible goals they advocate.⁸³⁸

C *Adversarial Compatibility — Condemnation*

[T]he application of proportionate punishment explicitly condemns the specific conduct that constitutes the offence and the specific offender as a culpable wrongdoer.⁸³⁹

Criminal law is arguably highly compatible with the adversarial process. In the first instance, the expression of condemnation inherent in criminal punishment is facilitated. Criminal punishment inflicts harsh treatment on culpable offenders in a manner that expresses condemnation, including reprobation and resentment toward those offenders.⁸⁴⁰ A third party theory of punishment considers that '[a]pplying tough legal sanctions to criminal offending may appease the punitive wishes of the wider public'.⁸⁴¹ Applying punishment in proportion to the severity of a specific offence and the culpability or blameworthiness of the offender emphatically reaffirms the societal condemnation of the category of conduct prescribed by the offence definition. This emphasis on the infliction of aversive consequences and the accompanying expression of condemnation can reasonably be expected to encourage confrontational, rather than mutually cooperative, attitudes.⁸⁴²

Moreover, an adversarial structure is appropriate to the criminal law, as it enables the application of harsh treatment upon the offender. One could imagine an institution that

⁸³⁷ James L Nolan, 'Reinventing Justice: The American Drug Court Movement' in Tamar Meekins, 'Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender' (2007) 12 *Berkeley Journal of Criminal Law* 75, 87.

⁸³⁸ Ibid.

⁸³⁹ Robert F Schopp, *Justification Defenses and Just Convictions* (Cambridge University Press, 1998) 23.

⁸⁴⁰ Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 95.

⁸⁴¹ Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9.

⁸⁴² Robert F Schopp, 'Pursuing Non-Adversarial Justice Within An Adversarial Structure' (2011) 37 *Monash University Law Review* 102, 109.

would express condemnation of the crime and of the culpable offender only through an emphatic statement of disapproval. In practice, however, criminal punishment expresses that condemnation by inflicting harsh treatment, such as incarceration and, in some jurisdictions, execution. Reform or rehabilitation might be components in an ideal outcome, but criminal punishment ordinarily pursues societal interests at the expense of convicted offenders by applying methods such as incarceration that are aversive to experience and result in disadvantages that extend beyond release. Thus, it is difficult to interpret the criminal justice process of trial and punishment as a cooperative process pursuing the converging interests of the offender and of the State.

D *The Reduced Condemnatory Emphasis in Non-Adversarialism*

[T]reatment regimes are not punishment, but the restructuring of the defendant's lifestyle.⁸⁴³

In stark contrast to the notion of harsh punishment, problem-solving courts are designed to pursue therapeutic interventions that benefit the offender in a manner that promotes societal interests in reducing recidivism. Such courts reflect the criticisms that the offenders who appear before them are less culpable than those addressed in conventional criminal courts. It is interpreted that this lesser culpability enhances the potential for rehabilitation, which, in turn, will reduce the risk of recidivism. Some problem-solving courts provide for expungement of the records of offenders who fulfil conditions of their suspended sentences. This thereby serves to retract the condemnation expressed by the initial requirements of a guilty plea and a suspended sentence as methods to enforce conditions of probation. Insofar as problem-solving courts apply suspended sentences, expunge records, or use similar approaches, they can reasonably be understood as pursuing the converging interests of society and of the defendant in reform and rehabilitation, through methods that are less condemnatory than traditional forms of criminal punishment. Criminal conviction and punishment, in contrast, might promote reform and rehabilitation in some offenders, but the application of serious criminal

⁸⁴³ Peggy Fulton Hora, William G Schma and John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 440.

sentences places a strong emphasis on punishment and condemnation of the culpable wrongdoer.⁸⁴⁴

The application of FLRT — demonstrative of improved biological understanding of human behaviour — will not exculpate people. The retributive elements underpinning the criminal justice system will not be removed. Instead, NeuroDiversification places ideas of punishment and retribution in their larger biological context, improving the rehabilitative customization with which the law can respond to criminal acts.⁸⁴⁵ It is anticipated that an emphasis on ‘a more progressive, consequentialist approach’⁸⁴⁶ will emerge, rather than a transformation of the legal praxis:

neuroscience will probably have a transformative effect on the law, despite the fact that existing legal doctrine can, in principle, accommodate whatever neuroscience will tell us.⁸⁴⁷

Neurolaw commentator and Professor of Law and Psychiatry at the University of Pennsylvania Stephen Morse argues that new neuroscience contributes nothing more than new details and that existing legal principles can handle anything that neuroscience will throw our way in the foreseeable future.⁸⁴⁸ Our operative legal principles exist because they more or less adequately capture an intuitive sense of justice. Neuroscience may challenge and ultimately reshape our intuitive sense(s) of justice⁸⁴⁹ — but not to a completely radical extent.

⁸⁴⁴ Robert F Schopp, ‘Pursuing Non-Adversarial Justice Within An Adversarial Structure’ (2011) 37 *Monash University Law Review* 102, 110.

⁸⁴⁵ David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 163.

⁸⁴⁶ Joshua Greene and Jonathan Cohen, ‘For the Law, Neuroscience Changes Nothing and Everything’ (2004) 359 *Philosophical Transactions Of The Royal Society Of London: Biological Sciences* 1775, 1775.

⁸⁴⁷ *Ibid.*

⁸⁴⁸ S J Morse, ‘New Neuroscience, Old Problems’ in *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* (Dana Press, 2004) 157.

⁸⁴⁹ Joshua Greene and Jonathan Cohen, ‘For the Law, Neuroscience Changes Nothing and Everything’ (2004) 359 *Philosophical Transactions Of The Royal Society Of London: Biological Sciences* 1775, 1775.

Consequentialist justification for punishment is ‘merely an instrument for promoting future social welfare’,⁸⁵⁰ and the retributivist justification for punishment is ‘to give people what they deserve based on their past actions’.⁸⁵¹ The common-sense approach has consequentialist elements, but is largely retributivist. Rehabilitative approaches to offender behaviour are not in the habit of ‘winning popular acceptance. Many people ... have a strong retributive impulse: they want to see punishment, not rehabilitation.’⁸⁵² Therapeutic jurisprudence seeks to give offenders a ‘voice, respect, neutrality and trust’.⁸⁵³ Its processes are also associated with ‘active and positive intervention, validation and self-worth’,⁸⁵⁴ and so for many victims of crime and the public, these are ‘soft’ options. Indeed:

Not only does some form of punishment respond to the needs of victims, being a form of recompense, but it is required to affirm the fundamental tenets of the legal system and enforce the sense of ‘justice’ or giving of someone’s ‘due’. This would further deter a number of malicious abuses that might come out of a purely therapeutic system.⁸⁵⁵

However, a ‘therapeutic system of justice’ would be about ‘responding to the needs of offenders and transforming society into a better place in the process’.⁸⁵⁶ That is to say, ‘identifying the cause ... loads us with the responsibility of doing something about it — treating the offender’.⁸⁵⁷ FLRT treats the offender, yet this treatment does not equate to unbridled exculpation.

Traditionally, criminal law aimed to achieve compliance with the law’s commands through the mechanism of deterrence — inducing in the offender the fear that he or she will experience more cost (pain of apprehension and punishment) than benefit from

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

⁸⁵² David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 185.

⁸⁵³ Kevin Burke, ‘Just What Made Drug Courts Successful?’ (2010) 36 *Criminal and Civil Confinement* 39.

⁸⁵⁴ Julia Foster, ‘The Drug Court: ‘A Police Perspective’ in Transforming Legal Processes in Court and Beyond (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 115.

⁸⁵⁵ Leanne Houston and Amy Vierboom, ‘Neuroscience and Law: Australia’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 39.

⁸⁵⁶ Ibid 38.

⁸⁵⁷ A Moir and D Jessel, *A Mind to Crime* (Michael Joseph, 1995).

illegal activities.⁸⁵⁸ In this way, the law casts blame and punishes, construing the law as the antagonist of the offender.⁸⁵⁹ However, judges and legal practitioners take on new roles in working together to apply ‘smart punishment’ rather than ‘punishment for the sake of retribution’⁸⁶⁰ and, in fact, ‘[t]he offender’s rehabilitation becomes a focus of the legal process.’⁸⁶¹

When primacy is given to an offender’s treatment, therapeutic jurisprudence provides an authoritative tone and set of practices that obscure law’s punitive function. Indeed, treating an offender within parameters traditionally established for the punitive ideal is problematic.⁸⁶² In 1971, the American Friends Service Committee published a scathing attack on rehabilitative penology, and included in its criticisms a fundamental objection to court-mandated treatment:

When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time.⁸⁶³

However, the incorporation of FLRT under the therapeutic jurisprudence approach relies upon ‘cognitive self-change to improve compliance’.⁸⁶⁴ In problem-solving courts, the attitude of the offender is judged rather than the nature of the crime.⁸⁶⁵ An offender’s

⁸⁵⁸ See P H Robinson and J M Darley, ‘The Utility of the Desert’ (1997) 91 *Northwestern University Law Review* 453; T R Tyler, ‘Legitimacy and Criminal Justice: The Benefits of Self-Regulation’ (2009) 7 *Ohio State Journal of Criminal Law* 307.

⁸⁵⁹ Heathcote Wales, Virginia Hiday and Bradley Ray, ‘Procedural Justice and the Mental Health Court Judge’s Role in Reducing Recidivism’ (2010) 33 *International Journal of Law and Psychiatry* 265, 266.

⁸⁶⁰ Jeffrey Tauber, ‘Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence’ in Melissa Bull, ‘Just Treatment: Testing the Limits of Therapeutic Jurisprudence’ (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 3.

⁸⁶¹ Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

⁸⁶² Oliver R Goodenough and Micaela Tucker, ‘Law and Cognitive Neuroscience’ (2010) 6 *Annual Review of Law and Social Science* 61, 76–7.

⁸⁶³ American Friends Service Community, *Struggle for Justice: A Report on Crime and Punishment in America* (Hill and Wang, 1971) 147.

⁸⁶⁴ David B Wexler, ‘Robes and Rehabilitation: How Judges Can Help Offenders “Make Good”’ (2001) 38 *Court Review* 20.

⁸⁶⁵ Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18 *eLaw Journal: Murdoch University Electronic Journal of Law* 1 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

responsibility for his or her offending behaviour in these courts shifts to responsibility for complying with a treatment program. In this way, success is considered in terms of how well a defendant has altered his or her thoughts and behaviours.⁸⁶⁶

III THE CONCEPT OF REHABILITATION

Terms such as ‘rehabilitation’, ‘desistance’, ‘reintegration’ and ‘re-entry’ are often used to refer to the social and psychological processes employed to assist individuals in the cessation of criminal activity and pursuit of productive and socially responsible lives.⁸⁶⁷ The process of engaging individuals in efforts to change their criminal attitudes and dispositions can be viewed as a normative and capacity-building process that primarily focuses on assisting them to construct personally meaningful and socially acceptable identities.⁸⁶⁸

The normative component of rehabilitation is evident in a number of ways: (i) the concept of an offender is a moral one, where individuals have been judged to have acted wrongly and illegally, and are punished accordingly; (ii) in order to be able to pursue a meaningful life, individuals must be able to identify what they find truly valuable and construct ways of living that will help them achieve outcomes, activities and traits that reflect their identified values; (iii) risk-reduction is usually a priority for all correctional programs and intervention efforts, but it is a value-laden concept in the sense that the aim is to reduce, manage and monitor possible negative outcomes for the community and offender; and (iv) a diverse range of values (for example, role standards or expectations, personal traits, activities, practices) of practical or narrative identities have been found to

⁸⁶⁶ P M Casey, ‘Position Paper on Therapeutic Jurisprudence’ (Paper presented at the Conference of State Court Administrators, Williamsburg, Virginia, 5 August 1999) 1.

⁸⁶⁷ Clare-Ann Fortune, Tony Ward and Gwenda M Willis, ‘The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives’ (2012) 19 *Psychiatry, Psychology and Law* 646, 647.

⁸⁶⁸ D R Laws and T Ward, *Desistance and Sexual Offending: Alternatives to Throwing Away the Keys* (Guilford Press, 2011); Friedrich Lösel, ‘What Works in Offender Rehabilitation: A Global Perspective’ (Paper presented at the 12th Annual Conference of the International Corrections and Prisons Association, Ghent, Belgium 24–29 October 2010); T Ward and D R Laws, ‘Desistance from Sex Offending: Motivating Change, Enriching Practice’ (2010) 9(1) *International Journal of Forensic Mental Health* 11.

be important components of successful desistance. The capacity-building dimension of rehabilitation is closely related to the normative dimension, as it also emphasizes the importance of the provision of resources and opportunities. The capacity-building dimension of rehabilitation specifies that offenders need to be provided with the internal resources (for example, attitudes, beliefs, knowledge, skills) and external (for example, social supports, intimate relationships, education, training, employment, leisure activities) to achieve their individually identified goals, which will help them attain better or good lives. Good lives are characterized as ones that enable individuals to have a sense of purpose, achieve higher levels of well-being, and adhere to socially prescribed norms.⁸⁶⁹

A *The Rehabilitation Theory: Features of an Effective Forensic Rehabilitation Model*

The term ‘rehabilitation theory’ refers to the overarching aims, values, principles, justifications and aetiological assumptions that are used to guide interventions and help therapists translate these principles into practice.⁸⁷⁰ Rehabilitation theories are essentially hybrid theories that contain a mixture of aetiological, ethical, methodological and practice elements. They can be distinguished from a type of therapy (for example, cognitive–behavioural or psychodynamic) or treatment theories that are more specific in nature and involve the application of principles and practical strategies to change an aspect of the behaviour of individuals. In short, a rehabilitation theory provides a comprehensive, unifying, explanatory framework for understanding an individual and his or her problems.

According to Ward and Maruna,⁸⁷¹ the ‘best’ rehabilitation theory is able to account for the agreed-upon factors of a problem behaviour (through its aetiological assumptions), has sufficient unifying power to incorporate important aspects of correctional or forensic rehabilitation (such as motivation, risk reduction and management, therapeutic process factors and content of therapy), is comparatively simple, has sufficient explanatory depth

⁸⁶⁹ T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

⁸⁷⁰ Ibid.

⁸⁷¹ Ibid.

to clarify whether certain causal factors should be targeted in treatment, is both internally and externally consistent, and results in effective therapy and, ultimately, reintegration.

Moreover, the purpose of offender-rehabilitation, as espoused in the Standard Guidelines for Corrections in Australia, is

to assist the rehabilitation of offenders through the adoption of productive, law-abiding lives in the community [and to provide] opportunities to address their offending behaviour and actively encourage ... access [to] evidence-based intervention programs, education, vocational education and work opportunities.⁸⁷²

There is also evidence that, as a rehabilitative mechanism, diversion can result in improved mental health outcomes for offenders.⁸⁷³ That diversion into treatment for a person with a mental health impairment is a public interest, rather than a private interest of the defendant, was recognized by the Court of Criminal Appeal in *DPP v El Mawas*.⁸⁷⁴ This is in line with the broad idea of using therapeutic jurisprudence to assist offenders to assist society and heeds the following:

it must, however, be clear from the outset to all concerned that it is the sentence of imprisonment, and not the treatment accorded in prison, that constitutes the punishment. Men come to prison as a punishment, not *for* punishment.⁸⁷⁵

1 *Recidivism-Reduction*

The overall aim of offender intervention is a reduction in recidivism.⁸⁷⁶ The mode of program delivery is crucial in achieving this aim. Programs based on a social-learning model of offending that are structured and skills-oriented, delivered with manuals by qualified staff, and which operate within supportive environments, can result in a 10–30 per cent reduction in offending.⁸⁷⁷

⁸⁷² Corrective Services Ministers' Conference, 'Standard Guidelines for Corrections in Australia' (Corrections, Prisons and Parole, 2012) 2, 12.

⁸⁷³ M Parsonage, *Diversion: A Better Way for Criminal Justice and Mental Health* (Sainsbury Centre for Mental Health, 2009) 20; K Sly et al, 'Court Outcomes For Clients Referred to a Community Mental Health Liaison Service' (2009) 32 *International Journal of Law and Psychiatry* 92, 93.

⁸⁷⁴ *Director of Public Prosecutions v El Mawas* [2006] NSWLR 93 [71].

⁸⁷⁵ Sir Alexander Paterson quoted in S K Ruck (ed), *Paterson on Prisons* (Muller, London, 1951) 23.

⁸⁷⁶ D A Andrews, James Bonta and R D Hodge, 'Classification for Effective Rehabilitation: Rediscovering Psychology' (1990) 17(1) *Criminal Justice and Behavior* 19.

⁸⁷⁷ Clare-Ann Fortune, Tony Ward and Gwenda M Willis, 'The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives' (2012) 19 *Psychiatry, Psychology and Law* 646, 648.

Recidivism, or the ‘ugly excess of the criminal law adversarial paradigm’,⁸⁷⁸ can be viewed as an imprimatur to the therapeutic jurisprudence movement, which emerged as a corrective to ‘the obduracy of recidivism rates’⁸⁷⁹ and ‘structural and operational problems of a fractured justice system’.⁸⁸⁰ It is known that ‘recidivism concerns ... drive the [therapeutic jurisprudence] agenda’.⁸⁸¹

According to some researchers,⁸⁸² it is inherently difficult (and unrealistic) to develop (and apply) a single definition of recidivism, as the term is constantly being re-defined as new and innovative attempts are undertaken to understand reoffending behaviour. Recidivism is generally seen as synonymous with terms such as repeat offending and reoffending.⁸⁸³ Rehabilitative efforts identify causes for offending and reduce reoffending by changing thoughts, feelings and behaviours.⁸⁸⁴ FLRT is comfortably housed within this desideratum.

⁸⁷⁸ James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?’ (2011) 35 *Melbourne University Law Review* 394, 394.

⁸⁷⁹ Ibid.

⁸⁸⁰ Greg Berman and John Feinblatt, ‘Problem-Solving Courts: A Brief Primer’ in Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 73, 78.

⁸⁸¹ Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1, 1 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

⁸⁸² See Jason Payne, ‘Recidivism in Australia: Findings and Future Research’ (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007) iii.

⁸⁸³ Ibid iv.

⁸⁸⁴ Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 123 *South African Law Journal* 63.

IV HUMAN RIGHTS

All human beings are born free and equal in dignity and rights.⁸⁸⁵

The ‘formulation of human rights theory and policies represents an ethical advance’⁸⁸⁶ in offender-rehabilitation. The topic of offender-rehabilitation involves public perception around crime and those who commit crime. Attitudes range from the unsympathetic to the sympathetic consideration of offenders as valued human beings. While punishment is warranted for wrongdoing, offenders ‘do not forfeit their basic dignity as persons’.⁸⁸⁷ Running parallel to the discourse on offender status and societal attitudes is the subject of human rights. As a rehabilitative treatment for criminal offenders, FLRT is relevant to human rights theory and its associated concepts.

The claim that ‘every human being possesses intrinsic value’⁸⁸⁸ is captured in the *Universal Declaration of Human Rights* (UDHR),⁸⁸⁹ and the two United Nations Covenants: the *International Covenant on Civil and Political Rights* (ICCPR)⁸⁹⁰ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁸⁹¹

A human right — ‘a weighty moral concept’⁸⁹² — is a claim for specific human goods made against another person or the State who thereby has a duty to provide the good claimed.⁸⁹³ Individuals hold human rights simply because they are members of the human race and, as such, are considered to be moral agents. Moral agents are individuals capable

⁸⁸⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 1.

⁸⁸⁶ Tony Ward and Astrid Birgden, ‘Human Rights and Correctional Clinical Practice’ (2007) 12 *Aggression and Violent Behavior* 628, 628.

⁸⁸⁷ Ibid 629.

⁸⁸⁸ Ibid.

⁸⁸⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁸⁹⁰ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸⁹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁸⁹² Tony Ward and Astrid Birgden, ‘Human Rights and Correctional Clinical Practice’ (2007) 12 *Aggression and Violent Behavior* 628, 630.

⁸⁹³ Ibid.

of formulating their own personal projects and seeking ways of realizing them in their day-to-day lives. In other words, agents are able to decide what is in their own best interests and act accordingly to secure them.⁸⁹⁴ The relationship between values and human rights is described by Michael Freedden, who argues that:

a human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection.⁸⁹⁵

Theorists argue that human rights protect what are considered to be essential attributes of human beings: needs, capacities and interests that, if guaranteed, respect their dignity as persons and, if violated, result in lives of desperation and diminishment.⁸⁹⁶

Human rights in Australia have been developed under Australian Parliamentary democracy and are safeguarded by the Australian Human Rights Commission, an independent judiciary and the High Court who apply the common law, the Australian Constitution, and various other laws of Australia and its States and Territories. Both express and implied rights are enshrined in the Australian Constitution.

Australia's obligations under international human rights law are found in treaties and customary international law.⁸⁹⁷ Australia is a party to the ICCPR and the ICESCR, which, together with the UDHR are known as the 'International Bill of Rights'. These have been built on by a range of treaties that deal with the rights of individuals and groups with particular needs, such as women, children and people with disabilities. Australia is a party to, inter alia, the *Convention against Torture and Other Cruel, Inhuman and*

⁸⁹⁴ Ibid.

⁸⁹⁵ M Freedden, *Rights* (University of Minnesota Press, 1991) 7.

⁸⁹⁶ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628, 630.

⁸⁹⁷ Attorney-General's Department National Human Rights Consultation Secretariat, *National Human Rights Consultation: Report/[National Human Rights Consultation Secretariat]* (Barton, ACT Attorney-General's Department, 2009) 100.

*Degrading Treatment or Punishment*⁸⁹⁸ and the *Convention on the Rights of Persons with Disabilities*.⁸⁹⁹

One of Australia's obligations under international human rights law is to prohibit discrimination on a number of grounds. The Federal Parliament has gone part of the way toward fulfilling this obligation by passing legislation such as the *Disability Discrimination Act 1992* (Cth), which implements parts of the ICCPR, the ICESCR, the *Convention on the Rights of the Child* (CRC)⁹⁰⁰ and the *Convention Concerning Discrimination in Respect of Employment and Occupation*.⁹⁰¹ A number of other instruments of federal legislation protect human rights, among them the *Australian Human Rights Commission Act 1986* (Cth).

The States and Territories of Australia have each enacted laws prohibiting discrimination and also have a variety of other laws that protect individual rights in specific contexts. The Australian Capital Territory and Victoria have both introduced statutory human rights legislation: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), respectively.

Relevantly, a number of human rights mechanisms exist for addressing access to mental health services in Australia, including the ICCPR, the ICESCR, the CRC and, more recently, the *Convention on the Rights of Persons with Disabilities*.⁹⁰² Taken together, these international legal instruments place a responsibility on the federal government to

⁸⁹⁸ *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁸⁹⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁹⁰⁰ *Convention on the Rights of the Child* United Nations (1989) *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁹⁰¹ *Convention Concerning Discrimination in Respect of Employment and Occupation*, ILO Convention No 111 Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960).

⁹⁰² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

ensure that citizens have access to the ‘highest attainable standard of physical and mental health’.⁹⁰³

In addition to these international legal human rights mechanisms, the United Nations adopted the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.⁹⁰⁴ These principles, including the right to the same standard of health care regardless of the mental or physical nature of illness, and the right to be treated in the least restrictive environment, were used to guide the development of the Australian National Mental Health Strategy in 1992.⁹⁰⁵

The United Nations *Convention on the Rights of Persons with Disabilities*⁹⁰⁶ was ratified by Australia in 2008. Article 4a obliges States ‘[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention’. This includes rights to the same ‘range, quality and standard of free or affordable health care’ generally, and specifically mentioned is that people deprived of liberty are entitled to the protections afforded in the Convention.⁹⁰⁷

The United Nations *Standard Minimum Rules for the Treatment of Prisoners*⁹⁰⁸ (United Nations 1957) includes provision for the treatment of people experiencing mental illness. Specifically, it recommends that treatment should occur under medical supervision and management in specialized institutions. Moreover, it is stipulated that everyone has the right to receive the best possible health care. In Victoria, this final point is recognized in legislation — that people with a mental illness should receive the highest possible

⁹⁰³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12; Mental Health Council of Australia, ‘Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia’ (Report, Mental Health Council of Australia, 2005) iii.

⁹⁰⁴ *Principles for the Protection of Persons with Mental Health Illness and for the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 75th plen mtg, UN Doc A/RES/46/119 (17 December 1991).

⁹⁰⁵ Mental Health Council of Australia, ‘Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia’ (Report, Mental Health Council of Australia, 2005) iv.

⁹⁰⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁹⁰⁷ Ibid.

⁹⁰⁸ Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663, UN Doc A/CONF/611 (30 August 1955).

standard of care, in the least restrictive environment. Further, the *Mental Health Act 1986* (Vic) recognizes that this standard of care should be comparable to the standard of care provided within the general health system.

In 2002, the National Mental Health Working Group of the Australian Health Ministers' Advisory Council proposed a *National Statement of Principles for Forensic Mental Health*, which has since been endorsed.⁹⁰⁹ The *National Statement of Principles* contained 13 principles for dealing with offenders or alleged offenders who have a mental illness. The Statement was endorsed by the National Mental Health Working Group of the Australian Health Ministers' Advisory Council.⁹¹⁰

Principle 1 addresses the notion of equivalence — that forensic clients should have the same access to and quality of mental health care as non-forensic clients. Principle 7 refers to ethical standards and highlights the importance of compliance with various international rights instruments.

The *National Statement of Principles* includes the following statement:

Legislation must recognize the special needs of people with a mental illness involved in the criminal justice system and comply with the International Covenant on Civil and Political Rights, the United Nations Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care.⁹¹¹

Diversion is also relevant to international human rights obligations, particularly in relation to the *Convention on the Rights of Persons with Disabilities*.⁹¹² Prior to the introduction of the Convention, international human rights instruments, such as the

⁹⁰⁹ Australian Health Ministers' Advisory Committee Mental Health Standing Committee (2006) *National Statement of Principles for Forensic Mental Health 2006* <[http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/\\$File/forens.pdf](http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/$File/forens.pdf)>

⁹¹⁰ Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health — from Crisis to Community* (December 2006) 343.

⁹¹¹ Australian Health Ministers' Advisory Committee Mental Health Standing Committee (2006) *National Statement of Principles for Forensic Mental Health 2006*, 18 <[http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/\\$File/forens.pdf](http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/$File/forens.pdf)>

⁹¹² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health,⁹¹³ adopted in 1991, influenced a ‘move towards emphasising rights in Australian mental health laws throughout the 1990s’.⁹¹⁴ Human rights have been particularly important in disability advocacy, both in Australia and elsewhere.⁹¹⁵ For example, the *Mental Health Act 2007* (NSW), which governs the civil mental health regime in New South Wales, identifies the protection of the civil rights of people with a mental health impairment as one of its objects.⁹¹⁶

Several articles of the Convention are potentially relevant. Article 5 provides a general right of equality and freedom from discrimination, including a guarantee that parties to the Convention will take all appropriate steps to ensure the provision of reasonable accommodation to achieve equality.⁹¹⁷ Article 13 guarantees a right to effective access to justice for people with disabilities on an equal basis with others,⁹¹⁸ and Article 14 provides for a right to liberty and security of person, including a right not to be arbitrarily or unlawfully deprived of one’s liberty, or deprived of it due to the existence of one’s disability.⁹¹⁹

These provisions recognize that it may be necessary to provide adjustments for people with cognitive and mental health impairments in order to ensure that the rights in question are accessible.⁹²⁰ As a result, the implementation and use of diversionary schemes would align with the rights goals of the Convention, and would assist to promote the rights of people with cognitive and mental health impairments.

⁹¹³ *Principles for the Protection of Persons with Mental Health Illness and for the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 75th plen mtg, UN Doc A/RES/46/119 (17 December 1991) 189–92.

⁹¹⁴ B McSherry and K Wilson, ‘Detention and Treatment Down Under: Human Rights and Mental Health Laws in Australia and New Zealand’ (2011) 19 *Medical Law Review* 548, 549.

⁹¹⁵ See, eg, Mental Health Coordinating Council, *Mental Health Rights Manual: A Consumer Guide to the Legal and Human Rights of People with Mental Illness in NSW* (Mental Health Coordinating Council, 3rd ed, 2011).

⁹¹⁶ *Mental Health Act 2007* (NSW) s 3(d).

⁹¹⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 5(3).

⁹¹⁸ *Ibid* art 13.

⁹¹⁹ *Ibid* art 14.

⁹²⁰ *Ibid* arts 13(1), 14(2).

The UDHR consists of a preamble asserting the dignity of human beings and 30 articles articulating specific rights to objects. Orend⁹²¹ groups the various rights contained in the UDHR into five clusters, each associated with a particular object: personal freedom, material subsistence, personal security, elemental equality and social recognition. The human rights object of personal freedom refers to a subset of objects such as freedom of speech, assembly, movement, association, conscience and religion, and is associated with a number of the specific rights contained in the UDHR. Further, it is directly linked to individuals' right to rely on their own judgement when deciding how to live their lives.

The human rights object of security concerns the physical safety and welfare of individuals. The subsistence object refers to a subset of objects including rights to basic levels of physical health, food, water and education. Equality denotes goods such as equality before the law and freedom from discrimination on the grounds of religion, gender, disability, or some other feature considered to be irrelevant for the ascription of individuals' moral status. Finally, social recognition is essentially concerned with acknowledging individuals' rights to direct the course of their own lives and to be treated in a dignified and respectful manner in accordance with their status as autonomous agents. The goods of self-respect and self-esteem are aspects of this category of goods and point to the importance of individuals possessing positive attitudes toward themselves and their own lives (in a sense, this is the internal component of human dignity). Thus, according to the UDHR and the two Covenants, 'human rights are universal entitlements to certain goods that if obtained will result in at least minimally decent and dignified human lives'.⁹²²

B *The Universality of Human Rights*

It is clear that offenders' freedom rights are typically curtailed in some respects and their movements, rights to privacy and association are restricted. Inevitably, incarceration, parole conditions and community-based orders will severely limit the enjoyment of some

⁹²¹ B Orend, *Human Rights: Concept and Context* (Broadview Press, 2002).

⁹²² Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628, 631.

of their rights. However, '[o]ffenders endure curtailment not forfeiture of rights'⁹²³ as a result of the crimes they have committed. Furthermore, as a non-invasive treatment option, FLRT does not constitute an impermissible intrusion upon a person's autonomy and personal liberty.⁹²⁴

Ward and Birgden⁹²⁵ have developed a framework for applying human rights to correctional practice based on the idea that dignity (via vulnerable agency) effectively grounds human rights laws and practices. In this model, there are three layers to human rights: core values of freedom and well-being protected by rights and derived from the notion of vulnerable agency;⁹²⁶ unpacking into further subsets of rights or goods;⁹²⁷ and specific human rights specifications or policies related to corrections.

From a human rights perspective, offenders still possess rights to the well-being goods and some of the freedom goods necessary for their functioning as purposive agents. This would mean that offenders should either be able to provide for themselves (or have the State provide) access to basic educational resources, medical care, self-esteem, adequate nutrition, access to leisure activities, healthy living conditions, the opportunity to work, access to good psychological and psychiatric services, as much choice concerning rehabilitation options and activities as possible within security requirements, just and fair disciplinary procedures with due process, and so on. In other words, basic physical, social and psychological human needs are to be met. The State is only justified in restricting certain freedoms in so far as this is necessary for the implementation of offenders' punishment (loss of certain liberties). The five human rights objects identified by Orend⁹²⁸ should be guaranteed as a matter of right.

⁹²³ Ibid 628.

⁹²⁴ Contra Center for Cognitive Liberty and Ethics, 'Threats to Cognitive Liberty: Pharmacotherapy and the Future of the Drug War' (Report, Contra Center for Cognitive Liberty and Ethics, 2004); Richard G Boire, 'Neurocops: The Politics of Prohibition and the Future of Enforcing Social Policy from Inside the Body' (2004) 19 *Journal of Law and Health* 215.

⁹²⁵ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628.

⁹²⁶ A Gewirth, *The Community of Rights* (University of Chicago Press, 1996); A Gewirth, *Self-Fulfillment* (Princeton University, 1998).

⁹²⁷ B Orend, *Human Rights: Concept and Context* (Broadview Press, 2002).

⁹²⁸ Ibid.

1 *Offender-Rehabilitation Management*

A coherent response to crime requires both (a) holding offenders to account and administering state-sanctioned punishments in a respectful and proportional manner, and (b) addressing social, vocational, or psychological deficits that have made it difficult for individuals to lead pro-social and personally meaningful lives. Both the administration of punishment and rehabilitation ought to be delivered in ways that reflect the dignity and intrinsic value of human beings.⁹²⁹

The application of the concept of human rights to the criminal justice system should occur at all three of the layers described above. Starting from the most concrete level, countries legally bound by the UDHR, the two Covenants, and other treaties concerning the rights of prisoners should ensure that the management of offenders complies with their requirements.⁹³⁰ This is likely to be reflected in specific policies regulating the running of prisons and community correctional services, such as disciplinary procedures, home leave entitlements, access to medical care, work opportunities, adequate living conditions, educational resources, and so on. For example, the ICCPR, Article 10, states: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’⁹³¹

Offenders can be simultaneous human rights violators, duty-bearers and rights-holders. The fact that offenders have often violated the human rights of their victims is reflected in their punishment and loss of liberty. It is possible to see rehabilitation as centrally concerned with offenders as human rights violators, duty-bearers and rights-holders. Providing individuals with the core skills or ‘virtues’ that underpin their agency, freedom and well-being should both promote human capacity to achieve good lives and also reduce their risk to others.⁹³² Further, modules such as empathy-training, cognitive skills, understanding the offence process, social skills and intimacy-training, and emotional

⁹²⁹ Tony Ward and Astrid Birgden, ‘Accountability and Dignity: Ethical Issues in Forensic and Correctional Practice’ (2009) 14 *Aggression and Violent Behavior* 227, 230.

⁹³⁰ A Coyle, *A Human Rights Approach to Prison Management: Handbook for Prison Staff* (International Centre for Prison Studies, 2002).

⁹³¹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10.

⁹³² T Ward and T Gannon, ‘Rehabilitation, Etiology, and Self-Regulation: The Good Lives Model of Sexual Offender Treatment’ (2006) 11 *Aggression and Violent Behavior* 77; T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007); T Ward and C A Stewart, ‘The Treatment of Sex Offenders: Risk Management and Good Lives’ (2003) 34 *Professional Psychology, Research and Practice* 353.

regulation are directly concerned with facilitating the ability of offenders to accurately infer, respond to and appreciate the experiences and needs of others. The acquisition of the capabilities to improve the quality of their own lives and to respect those of others will necessarily involve recognition of the freedom and well-being of other people.

2 *A Human Rights Framework and the GLM*

In terms of offender-rehabilitation, a human rights framework resonates strongly with strength-based approaches to offender-rehabilitation, such as the GLM,⁹³³ for which FLRT is considered a consistent treatment, as established in Chapter 2. The GLM is a theory of rehabilitation that endorses the viewpoint that offenders are essentially human beings, with similar needs and aspirations to non-offending members of the community, and, as such, they should be treated with the basic respect that such status implies. The GLM is based around two core therapeutic goals: to promote human goods and to reduce risk. The GLM aims to: (i) focus on the utilization of individual offender's primary goods or values in the design of intervention programs, and (ii) equip an offender with the capabilities necessary to implement a better life plan founded on these values. The GLM is an approach based on the pursuit of better lives, ways of living that are constructed around core values, and concrete means of realizing individual goals in certain environments.⁹³⁴ A human rights perspective can be conceptualized as the ethical heart of strength-based approaches such as the GLM and by virtue of its emphasis on rights and duties, it can deal with the risk-management aspect of rehabilitation alongside goods promotion.⁹³⁵

⁹³³ T Ward and M Brown, 'The Good Lives Model and Conceptual Issues in Offender Rehabilitation' (2004) 10 *Psychology, Crime, and Law* 243; T Ward and T Gannon, 'Rehabilitation, Etiology, and Self-Regulation: The Good Lives Model of Sexual Offender Treatment' (2006) 11 *Aggression and Violent Behavior* 77; T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

⁹³⁴ S Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (American Psychological Association, 2001); T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

⁹³⁵ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628, 637.

All this is to say that human rights protect the core interests and capacities of human beings and thereby give them opportunities to live good lives.⁹³⁶ Good lives are lives that reflect peoples' capacity to make voluntary choices concerning the nature and pursuit of personally valued goals.⁹³⁷ The GLM places strong emphasis on the concept of human agency and is grounded in universal human rights. In keeping with a human rights perspective, the GLM-FM places the patient, rather than risk-reduction, at its core. In other words, individual patients are seen as self-determining agents rather than disembodied carriers of risk.⁹³⁸

Desistance is an active, offender-led process, where the desisting individual is determined to follow choices of action by weighing up the pros and cons of continued offending. It is an offender's sense of ownership of the change process and realization of his or her own abilities to exercise self-regulation (that is, agency) that leads to crime desistance.⁹³⁹ The principles of the GLM and its promotion of human rights are all in keeping with the established purpose of FLRT-integration into the Australian legal system.

3 *Human Rights and Therapeutic Jurisprudence*

The impact of the legal system upon those subject to it can also be considered within a human rights framework. As a theory, therapeutic jurisprudence employs psychological knowledge to determine ways in which the law can enhance well-being in those individuals who experience it (including both victims and offenders). Further, therapeutic jurisprudence allows an intersection between forensic psychology and human rights.⁹⁴⁰ In this context, legal procedures may be anti-therapeutic and so result in reduced well-

⁹³⁶ S Matthew Liao, 'Human Rights as Fundamental Conditions for a Good Life' in R Cruft, S M Liao and M Renzo (eds), *The Philosophical Foundations of Human Rights*, (Oxford University Press, 2015) (forthcoming).

⁹³⁷ Ibid.

⁹³⁸ T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

⁹³⁹ S Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (American Psychological Association, 2001).

⁹⁴⁰ M L Perlin, "'With Faces Hidden While the Walls Were Tightening': Applying International Human Rights Standards to Forensic Psychology' (Paper presented at the 15th European Law and Psychology Conference, Vilnius, Lithuania, July 2005).

being.⁹⁴¹ In particular, therapeutic jurisprudence considers the impact of substantive law, legal procedures and the role of legal actors.⁹⁴² It is particularly useful in considering the therapeutic role of correctional practitioners, as legal actors, in the assessment, treatment and monitoring of offenders.⁹⁴³ Arguably, therapeutic jurisprudence is underpinned by the concept of dignity and enhanced by its elaboration into human rights norms.⁹⁴⁴

4 *Human Rights and Ethical Offender Assessment and Treatment*

Ethical offender assessment is conducted in a respectful and competent manner that is transparent regarding the intrusion of social and moral values in the assessment process, and it ensures that the rights of offenders are not automatically assumed to carry less weight than those of other members of the community.⁹⁴⁵

Human rights impose significant duties on practitioners concerning offender assessment. Practitioners are to ensure that ‘the assessment process culminates in an aetiological formulation that is tailored to the individual’s unique features alongside those that they share with other offenders’.⁹⁴⁶

Drawing upon the concept of human rights (core values and objects) facilitates improved quality of assessment data and, therefore, better formulated decisions.⁹⁴⁷ For example, a collaborative approach involves a genuine commitment from the practitioner to working transparently and respectfully, and to emphasizing that the offender’s best interests are to be served by the assessment process. Potential issues of risk and need are presented to the client as areas for collaborative investigation. The collaborative risk-assessment process

⁹⁴¹ D P Stolle et al, ‘Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Approach to Lawyering’ in D P Stolle, D B Wexler, B J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) 5.

⁹⁴² D B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

⁹⁴³ A Birgden, ‘Therapeutic jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation’ (2004) 10 *Psychology, Crime, and Law* 283.

⁹⁴⁴ Tony Ward and Astrid Birgden, ‘Accountability and Dignity: Ethical Issues in Forensic and Correctional Practice’ (2009) 14 *Aggression and Violent Behavior* 227, 230.

⁹⁴⁵ Tony Ward and Astrid Birgden, ‘Human Rights and Correctional Clinical Practice’ (2007) 12 *Aggression and Violent Behavior* 628, 637.

⁹⁴⁶ Ibid.

⁹⁴⁷ Ibid.

is introduced as a conscious strategy, and the early indicators are that relationships between practitioners and offenders are greatly improved, with a subsequent positive effect on motivation and retention in treatment.⁹⁴⁸ Ideally, rehabilitation should embody the twin aims of reducing the likelihood of harm to society and enhancing the well-being of offenders.⁹⁴⁹ The aim should be to formulate an intervention plan that respects offenders' agency and personal preferences with respect to their significant projects and plans, and does not infringe the rights of others.⁹⁵⁰

Compliance with human rights treaties requires ensuring that there are no discriminatory practices evident in the rehabilitation process (for example, excluding individuals from programs on the basis of race, class or gender). In addition, offenders should be treated with dignity, their agency should be respected, they should only suffer the restrictions of freedom that are rationally justified, and they should have access to the basic goods of well-being such as education, self-esteem, support, mental and medical resources, and so on. Indeed:

Human rights are protective capsules that strengthen valued aspects of human functioning such as freedom and the various components of well-being including basic needs, education, mastery, and self-esteem.⁹⁵¹

It is arguable that the various modules offered to offenders actually help them to acquire the capabilities or virtues necessary to exercise their human rights and, therefore, to function as purposive agents. These modules include problem-solving, cognitive skills, social and intimacy skills, affect-regulation, understanding offending-reflective agency, lifestyle-planning (relapse-prevention), empathy, and cognitive restructuring. Participating in treatment programs that contain modules such as these is likely to help offenders both acknowledge others' rights and value as human beings, as well as enabling them to pursue their own personal projects in socially acceptable ways. Thus, a human

⁹⁴⁸ R E Mann and J Shingler, 'Collaboration in Clinical Work with Sexual Offenders: Treatment and Risk Assessment' in W L Marshall et al (eds), *Sexual Offender Treatment: Controversial Issues* (John Wiley and Sons, 2006) 225.

⁹⁴⁹ T Ward and S Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

⁹⁵⁰ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628, 638.

⁹⁵¹ Ibid 639.

rights perspective provides practitioners with an ethical framework that allows them to select the therapy skills required and to deliver them in ways responsive to an offender's unique issues and needs.⁹⁵²

Human rights have bearing upon offender-education and upon treatment design and delivery. Human rights provide an ethical scaffold that supports the skills that offenders learn and the values that they acquire into one simple idea: pursue one's own core and legitimate interests in way that respects the rights of others to do the same.

Human rights theory constitutes a valued ethical and therapeutic resource in the process of rehabilitation and directs attention to the conditions required for offenders to live more socially acceptable and personally meaningful lives. The aim is to ensure that offenders acquire the capabilities to identify important personal values and projects, to implement them in the environments in which they are likely to be living, and, in the process, grasp the necessity of respecting the moral status of others. In short, a human rights perspective provides an ethical core to the delivery of a skills-oriented rehabilitation program.⁹⁵³

V THE GREY MATTERS OF NEUROETHICS

Ethics 'is essentially a means for coordinating the conflicting interests of peoples and nations and human rights provide a strong foundation to do this in multiple domains'.⁹⁵⁴ Recently, President Obama charged the Presidential Commission for the Study of Bioethical Issues Bioethics Commission to 'identify proactively a set of core ethical standards' in the neuroscience domain.⁹⁵⁵ In doing so, the Commission is to consider the potential implications of new neuroscience discoveries, as well as a series of questions that may be raised by those findings and their applications, such as those 'relating to ...

⁹⁵² Ibid 640.

⁹⁵³ Ibid.

⁹⁵⁴ Ibid 628.

⁹⁵⁵ Presidential Commission for the Study of Bioethical Issues, *Presidential Charge to the Commission for the Study of Bioethical Issues* (1 July 2013) <<http://bioethics.gov/sites/default/files/news/Charge%20from%20President%20Obama.pdf>>.

the appropriate use of neuroscience in the criminal-justice system'.⁹⁵⁶ Bioethics 'attempts to enable the two domains of science and morality to inform and complement each other. It deals seriously with the moral and humanistic questions raised by technological innovation'.⁹⁵⁷

In the light of President Obama's charge, the *MacArthur Foundation Research Network on Law and Neuroscience* (the 'Research Network') prepared a consensus statement, including 16 specific recommendations, submitted in answer to the Bioethics Commission's call for comments.⁹⁵⁸

New neuroscientific technologies and findings have raised, and will increasingly raise, important ethical implications. These include issues relating to fundamental fairness and respect for persons, such as concerns about misrepresentations and unjustified inferences that can be drawn from neuroscientific evidence, the uses of neuroscience for lie detection or memory detection, and the role of neuroscience in potentially detecting and counteracting stereotyping. These also include, as President Obama noted in his charge to the Commission, concerns about potential 'stigmatization and discrimination based on neurological measures'.⁹⁵⁹ There is, therefore, a continuing need for discussion and analysis of these issues. The most sensible and effective approach is to conduct such a discussion and analysis in parallel with the development of the technologies that give rise to them.⁹⁶⁰

⁹⁵⁶ Ibid.

⁹⁵⁷ Richard N Wolman, *Thinking with your Soul* (Harmony Books, 2001) 34.

⁹⁵⁸ Federal Register, *Request for Comments on the Ethical Considerations of Neuroscience Research and the Application of Neuroscience Research Findings* (31 January 2014) <<https://www.federalregister.gov/articles/2014/01/31/2014-02072/request-for-comments-on-the-ethical-considerations-of-neuroscience-research-and-the-application-of>>.

⁹⁵⁹ Presidential Commission for the Study of Bioethical Issues, *Presidential Charge to the Commission for the Study of Bioethical Issues* (1 July 2013) <<http://bioethics.gov/sites/default/files/news/Charge%20from%20President%20Obama.pdf>>.

⁹⁶⁰ Owen D Jones et al, 'Law and Neuroscience: Recommendations Submitted to the President's Bioethics Commission' (2014) *Journal of Law and the Biosciences* 224, 233.

Recommendation 14 of the Recommendations Submitted to the President’s Bioethics Commission⁹⁶¹ suggests that the Commission’s Report should caution against over-interpreting neuroscientific data, given the important legal and ethical issues often implicated. This is bolstered by Recommendation 15, which advises that the Commission’s Report should caution against misuses of neuroscientific data to enhance racial, ethnic, gender or other stereotypes, encourage awareness of the history and risks of such misuses, and encourage researchers to take active steps to prevent misinterpretations and misuses. Recommendation 16 implores the Commission to recommend that the President’s Brain Research through Advancing Innovative Neurotechnologies (BRAIN) Initiative include an explicit and substantial Ethical, Legal and Social Implications component, reflected in a dedicated percentage of the overall budget.⁹⁶²

VI RULE-OF-LAW PRINCIPLES

Another theoretical hurdle to the incorporation of FLRT into the Australian criminal justice system is the conceivable immiscibility of this therapeutic treatment with established rule-of-law principles.

A V Dicey, British jurist and constitutional scholar, is considered the father of the modern conception of the rule of law.⁹⁶³ Although writing about the English Constitution, and therefore about a unitary system of government rather than a federal one, such as those of Australia, Canada and the United States of America, Dicey’s rule of law is nevertheless relevant to both forms of polity. The rule of law ensures that every person and organization, including the government, is subject to the same laws,⁹⁶⁴ whereby no person is above the law. The rule of law — despite ‘dissensus as to [the] meaning’⁹⁶⁵ of

⁹⁶¹ Ibid 234.

⁹⁶² Ibid.

⁹⁶³ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 179.

⁹⁶⁴ Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 387.

⁹⁶⁵ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331, 332.

this ‘chameleon-like’ phrase⁹⁶⁶ and ‘exceedingly elusive notion’⁹⁶⁷ — is in fact one of the key dimensions that determine the quality and good governance of a country.⁹⁶⁸ Considered a formalist,⁹⁶⁹ his 1885 construction of the rule of law comprises supremacy of law, equality, and privileging judicial process.

A *Supremacy of Regular Law over Arbitrary Powers*

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.⁹⁷⁰

Hailed as the ‘core of the rule of law principle’,⁹⁷¹ the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint. A more concise expression of this first meaning of the rule of law was proffered by Thomas Fuller in 1733: ‘Be you ever so high, the law is above you.’⁹⁷² This formalist principle asserts the absolute supremacy of regular law as opposed to the influence of arbitrary power, and this excludes the existence of arbitrariness, prerogative or even wide discretionary authority on the part of the government. Punishment can be justly administered only for breach of the law.⁹⁷³ If anyone is to be penalized, it must be for a proven breach of the established law of the land. It must be a breach established before the ordinary courts, not a tribunal lacking the independence and impartiality of judges.⁹⁷⁴ In other words, questions of legal right and liability should ordinarily be resolved by application of the law and not the raw exercise

⁹⁶⁶ Robert Stein, ‘Rule of Law: What Does it Mean?’ (2009) 18 *Minnesota Journal of International Law* 293, 296.

⁹⁶⁷ Brian Z Tamanaha, *On The Rule Of Law* (Cambridge University Press, 2004) 3.

⁹⁶⁸ Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, ‘Governance Matters VI: Governance Indicators for 1996–2006’ (Working Paper No 4280, World Bank, 2007) 2.

⁹⁶⁹ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) 21 *Public Law* 467, 468.

⁹⁷⁰ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 179.

⁹⁷¹ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 78.

⁹⁷² Thomas Fuller, as quoted by Lord Denning MR in *Gouriet v Union of Post Office Workers* [1977] QB 729, 762.

⁹⁷³ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 184.

⁹⁷⁴ Lord Bingham, *The Rule Of Law* (Penguin Group, 2010) 4.

of discretion.⁹⁷⁵ The discretion of law enforcement and crime prevention agencies should not be allowed to pervert the law.⁹⁷⁶ Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred, and without exceeding the limits of such powers.⁹⁷⁷

The principle that the State is bound by the law requires that the State acts on the basis of, and in accordance with, the law. This means that all decisions and acts of public officials must be authorized by law, and that all legal subjects, especially State authorities and officials, should be bound by the law when carrying out official functions. Policy and decision-making must respect the limits and the guidance provided by the law.⁹⁷⁸

B *Privileging Judicial Process*

[Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts ...⁹⁷⁹

Commenting on the United Kingdom specifically, Dicey's third principle enunciates that the principles of the constitution are the result of judicial decision of the courts. In other countries, however, rights, including the right to personal liberty, are guaranteed by a written constitution. In the British context, those rights are the result of judicial decisions, in concrete cases, arising between parties. Thus, the constitution is not the source, but rather the consequence, of the rights of the individuals.

⁹⁷⁵ Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72.

⁹⁷⁶ Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 201.

⁹⁷⁷ Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 78.

⁹⁷⁸ Frithjoh Ehm, 'The Rule of Law: Concept, Guiding Principle and Framework' (Paper presented at the Unidem Campus Trieste Seminar, Trieste, Italy, 12–15 April 2010) 11.

⁹⁷⁹ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 187.

C *Equality Before the Law*

We mean in the second place ... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.⁹⁸⁰

In this sense the rule of law ‘excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals’.⁹⁸¹ The law must apply to everyone equally, without making arbitrary distinctions among people.⁹⁸² Put simply, everyone is equal before the law, including government officials.⁹⁸³ The same law, administered in the same courts, applies to all.

1 *Generality*

[T]he laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.⁹⁸⁴

In line with Dicey’s second principle — equality before the law — the law should apply, without exception, to everyone whose conduct falls within the prescribed conditions of application. Rousseau described this requirement of generality as being that ‘the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action’.⁹⁸⁵ Equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges. Notwithstanding this, special legislative provisions can properly be made for some categories of people such as children, prisoners and the mentally ill. Yet, in the main, the law must be general, both in statement and intent, and must not be used as a

⁹⁸⁰ Ibid 185.

⁹⁸¹ Ibid 187.

⁹⁸² F A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 209–10.

⁹⁸³ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897), 188; See also H W Arndt, ‘The Origins of Dicey’s Concept of the “Rule of Law”’ (1957) 31 *Australian Law Journal* 117.

⁹⁸⁴ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 73.

⁹⁸⁵ Jean-Jacques Rousseau, *The Social Contract* in Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 66.

way of harming particular individuals.⁹⁸⁶ The law must apply to everyone equally, without making arbitrary distinctions among people.⁹⁸⁷ Put simply, everyone is equal before the law.⁹⁸⁸ The same law, administered in the same courts, applies to all.

By focusing on individual needs ‘rather than equal justice for all’,⁹⁸⁹ therapeutic jurisprudence arguably abandons the overarching Diceyan principle of equality before the law. Dicey himself cautions; ‘any attempt to individualize the law may undermine it.’⁹⁹⁰ Indeed the rehabilitative efficacy of FLRT as a healing mechanism is dependent upon the degree to which a person’s biology is ‘modifiable’,⁹⁹¹ appropriate for rehabilitating those who know the proper course of action but cannot resist impulsive behaviour.⁹⁹² There are plasticity ‘limitations, and prerequisites — such as healthy brain tissue and the capacity for motivation and focus’.⁹⁹³ Some people have brains that are better able to respond to classical conditioning (punishment and reward), while other people — because of psychosis, sociopathy, frontal maldevelopment or other problems — are refractory to change.⁹⁹⁴ Punishment aimed at disincentivizing certain behaviours will only work if there is appropriate brain plasticity to receive it. Just as the ‘myth of human equality suggests that all people are equally capable of decision making, impulse-control, and comprehending consequence’,⁹⁹⁵ there are varying degrees of brain plasticity and varying responsiveness to treatment and punishment.

⁹⁸⁶ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 209; L L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 146.

⁹⁸⁷ F A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 209–10.

⁹⁸⁸ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 188; See also H W Arndt, ‘The Origins of Dicey’s Concept of the “Rule of Law”’ (1957) 31 *Australian Law Journal* 117.

⁹⁸⁹ Eric Cohen, ‘The Drug Court Revolution: Do We Want Theory Rather than Justice to Become the Basis of Our Legal System?’ (2003) 20 *Weekly Standard* 15, 20.

⁹⁹⁰ Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685.

⁹⁹¹ David Eagleman, ‘The Brain on Trial’ *The Atlantic* (July/August 2011) 188–9.

⁹⁹² David Eagleman, Mark Correrio and Jyotpal Singh, ‘Why Neuroscience Matters for Rational Drug Policy’ (2010) 11(1) *Minnesota Journal of Law, Science and Technology* 7, 24.

⁹⁹³ Leanne Houston and Amy Vierboom, ‘Neuroscience and Law: Australia’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 38.

⁹⁹⁴ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 249.

⁹⁹⁵ *Ibid* 253.

A person's sentence — their prescribed prefrontal work-out regimen — is based on some as-yet-undiscovered measure of neuroplasticity.⁹⁹⁶ The concept of variable neuroplasticity is important, Eagleman observes, because contrary to the ideals of developed democracies, all people are not created equal: 'While admirable, the notion [of human equality] is simply not true.'⁹⁹⁷ People vary widely both in nature and in nurture.⁹⁹⁸ With this truth in hand, we could 'tailor sentencing and rehabilitation' to the individual's specific neurobiological make-up.⁹⁹⁹

Not all people who increase their capacity for self-reflection will come to the same sound conclusions, but at least the opportunity to listen to the debate of the neural parties is available. This approach may restore some of the power of deterrence, which can work for people who think about and act upon long-term consequences. For the impulsive, though, threats of punishment carry little to no weight in decision-making.

Genevan philosopher, Jean-Jacques Rousseau described this requirement of generality as being that 'the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action'.¹⁰⁰⁰ For example, equality is reflected in a substantive way: not just that no one is above the law, but that everyone is equal before and under the law, and is entitled to its equal protection and equal benefit.¹⁰⁰¹ In this way, the advances of neuroscience would act to further confirm principles held dear to the functioning of the legal system, while enhancing the benefits for society that may be achieved through the justice system.¹⁰⁰²

⁹⁹⁶ David Eagleman, 'The Brain on Trial' (July/August 2011) *The Atlantic*, 188–9.

⁹⁹⁷ Ibid.

⁹⁹⁸ Ibid 187.

⁹⁹⁹ Ibid 188.

¹⁰⁰⁰ Jean-Jacques Rousseau, *The Social Contract* in Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 66.

¹⁰⁰¹ Louise Arbour, 'The Rule of Law', *New York Times* (online), 26 September 2012, <http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html?_r=0>.

¹⁰⁰² Leanne Houston and Amy Vierboom, 'Neuroscience and Law: Australia' in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 39.

2 Aspirational Rule-of-Law Adherence

Therapeutic jurisprudence work seeks to apply psychological and social science theory to speculate about the therapeutic consequences of a particular legal rule.¹⁰⁰³

Therapeutic jurisprudence suggests that, ‘other things being equal’,¹⁰⁰⁴ positive therapeutic effects are desirable and should generally be a proper aim of law, and that anti-therapeutic effects are undesirable and should be avoided or minimized. Winick has argued that a humane, balanced and respectful process can be extended to the mainstream justice system.¹⁰⁰⁵ Law properly attempts to further many ends, and therapeutic jurisprudence does not seek to subordinate those other ends to therapeutic ones. Legal actors are encouraged to apply the law therapeutically, but only when consistent with other established legal values,¹⁰⁰⁶ such that ‘therapeutic values should not “trump” certain traditional values of justice’.¹⁰⁰⁷

Although therapeutic jurisprudence is normative in orientation in that it suggests that law should seek to further therapeutic ends, it does not suggest that therapeutic ends are the only ones that law should seek to accomplish, or that they are necessarily the more important ends. This normative agenda that drives therapeutic jurisprudence research is not the neutral, value-free mode of scholarly inquiry that law and psychology and social science in law often try to be.¹⁰⁰⁸ Countervailing normative considerations may often justify a legal rule or practice found to produce anti-therapeutic consequences, and therapeutic jurisprudence does not purport to be a method of determining which factor should predominate in legal decision-making.¹⁰⁰⁹ Rather, the movement simply suggests

¹⁰⁰³ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’(1997) 3 *Psychology, Public Policy, and Law* 184, 195.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Pamela Casey and David Rottman, ‘Therapeutic Jurisprudence in the Courts’ (2000) 18 *Behavioral Sciences and the Law* 446, 451.

¹⁰⁰⁶ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy, and Law* 184, 203.

¹⁰⁰⁷ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence, Part II* (Carolina Academic Press, 2003) xi–xii.

¹⁰⁰⁸ Ibid 188.

¹⁰⁰⁹ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence, Part II* (Carolina Academic Press, 2003) xi–xii.; Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’(1997) 3 *Psychology, Public Policy, and Law* 184, 186–7.

that '[l]egal actors should seek to apply the law therapeutically but only when consistent with these values.'¹⁰¹⁰

When evaluating the conflict between the rule of law and other values, therapeutic jurisprudence concedes¹⁰¹¹ to philosopher Joseph Raz' statement: 'conformity to the rule of law is a matter of degree, and though other things being equal, the greater the conformity the better — other things are rarely equal'.¹⁰¹² As evidenced, therapeutic jurisprudence fails to articulate clear rules for determining exactly when other things are equal and whether and under what circumstances therapeutic values must yield to other values.¹⁰¹³

Winick asserted that therapeutic jurisprudence does not 'trump' legal principles, though in practice this may not be the case. Australian academic Mark Harris reports that judges' approaches vary despite the view that law is 'neutral, invariant and consistently oriented around a set of legal principles'.¹⁰¹⁴ Former Western Australian Magistrate Michael King's response is that policy initiatives enforce 'laws more effectively', without encroaching 'on the executive or legislative function',¹⁰¹⁵ whereby 'therapeutic considerations did not *necessarily* trump other considerations'.¹⁰¹⁶ There is no clear indication of how the word 'necessarily' is to be interpreted, and no clear guidelines in preserving the executive and legislative functions when a judge imposes policy initiatives.

¹⁰¹⁰ Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy, and Law* 184, 203.

¹⁰¹¹ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence, Part II* (Carolina Academic Press, 2003) xi–xii.

¹⁰¹² Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 210.

¹⁰¹³ John Petrila, 'A Review of Essays in Therapeutic Jurisprudence' (1993) 10 *New York Law School Journal of Human Rights* 877, 890.

¹⁰¹⁴ Mark Harris, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 130, 134 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹⁰¹⁵ Michael S King, 'Applying Therapeutic Jurisprudence in Regional Areas — The Western Australian Experience' (2003) 10(2) *eLaw Journal: Murdoch University Electronic Journal of Law* para 17 <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>>.

¹⁰¹⁶ Michael S King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 14 (emphasis in original) <<http://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>.

3 *Beyond Therapeutic Jurisprudence Beneficence*

We ought not become robed therapeutic administrators just because we have convinced ourselves we are acting for the public good.¹⁰¹⁷

Therapeutic jurisprudence urges people to think less of the law in terms of rules and more about therapeutic outcomes. It is, for example, less committed to what the ‘Supreme Court, or state legislatures might say’.¹⁰¹⁸ In this manner, the rule of law is subordinated in favour of doing things to people for their own good, and because it is deemed to be in their best interests or the best interests of the State. While it is laudable to believe ‘sincerely and passionately in the curative power of their therapeutic mission’,¹⁰¹⁹ such advocates may encounter difficulty when faced with traditional rule of law principles.

Proponents argue that the breadth, inclusiveness, internationalism, cross-disciplinarity and modesty of therapeutic jurisprudence are its strengths. It is these characteristics that give ‘a fillip to innovative perspectives and new assessments’.¹⁰²⁰ Advocates further believe that ‘there is no need for therapeutic jurisprudence to yearn for coherence and clarity of definition. If it continues to foster new, lively, and sometimes revolutionary insights and experiments designed to reduce the counter therapeutic effects of law and legal process, it will continue to be a worthwhile lens and catalyst.’¹⁰²¹ However, just how worthwhile it is remains the subject of debate.

The notion of therapeutic jurisprudence may be laden with good intentions, yet ‘good intentions [a]re no substitute for due process’.¹⁰²² It appears that programs utilizing therapeutic jurisprudence will be justified more on their beneficial intentions than their legal standing. Although it offers a well-intentioned attempt ‘to reconcile or

¹⁰¹⁷ Morris B Hoffman, ‘Commentary: The Drug Court Scandal’ (2000) 78 *North Carolina Law Review* 1437, 1526–7.

¹⁰¹⁸ David B Wexler, ‘Two Decades of Therapeutic Jurisprudence’ (2008) 24 *Touro Law Review* 17, 18.

¹⁰¹⁹ Morris B Hoffman, ‘Essay: Problem-Solving Courts and the Psycholegal Error’ (2011) 160 *University of Pennsylvania Law Review* 129, 132.

¹⁰²⁰ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 591.

¹⁰²¹ Ibid 592.

¹⁰²² *In re Gault*, 387 US 1 (1967).

accommodate its paradigm with traditional legal values’,¹⁰²³ it is more than an innocuous approach to law that *only* ‘recognizes, highlights, and explores, often through socio-psychological insights, the multifarious potential for positive and negative impacts upon stakeholders’.¹⁰²⁴

It may be that the ‘simple human desire to help’¹⁰²⁵ perpetuates the therapeutic jurisprudence movement, but critics assert that therapeutic jurisprudence has been ‘evangelized loosely and with uncritical fervor — thereby generating claims it cannot realistically satisfy’.¹⁰²⁶ Moreover, it is not considered ‘a coherent body of scholarship with a unified focus that proffers coherent and straightforward answers to complex issues in law and practice’.¹⁰²⁷ Instead, it offers a rather vague ‘lens’ through which to advance its ‘amorphous and ever-shifting claims’.¹⁰²⁸ Wexler has contended that it is inappropriate to tightly define what is therapeutic, opting rather to ‘roam within the intuitive and common sense contours of the concept’.¹⁰²⁹ So, although it seeks to reduce anti-therapeutic outcomes and increase therapeutic outcomes, with regard to actual specificities, ‘[therapeutic jurisprudence] equivocates’.¹⁰³⁰ Consequently, the ‘uncritical enthusiasm with which therapeutic jurisprudence has been embraced should be tempered by more critical analysis of the key assumptions made by Wexler and Winick’,¹⁰³¹ so as

¹⁰²³ David Wexler, ‘Two Decades of Therapeutic Jurisprudence’ (2008) 24 *Touro Law Review* 17, 18.

¹⁰²⁴ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 589.

¹⁰²⁵ Morris B Hoffman, ‘Essay: Problem-Solving Courts and the Psycholegal Error’ (2011) 160 *University of Pennsylvania Law Review* 129, 132.

¹⁰²⁶ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 593.

¹⁰²⁷ *Ibid* 591.

¹⁰²⁸ Mae C Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 592.

¹⁰²⁹ David B Wexler, ‘Reflections on the Scope of Therapeutic Jurisprudence’ (1995) 1 *Psychology Public Policy, and Law* 220, 221.

¹⁰³⁰ Mae C Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 592.

¹⁰³¹ John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 881.

to avoid therapeutic jurisprudence being ‘called in aid or used as a sword or shield illegitimately or uninformedly’.¹⁰³²

Concerns surrounding FLRT and the theoretical obstacles to its integration may be overstated. Indeed, there are invariably problems at the margins of all new concepts, and incorporating FLRT for impulse-control management in the rehabilitation of criminal offenders, and touting this rehabilitative treatment as a form of therapeutic jurisprudence, is no exception. Comfort can, however, be derived from the fact that promotion of the therapeutic jurisprudence approach is not tantamount to ‘excessive innovation and adventurism by the judges’,¹⁰³³ as cautioned by Lord Bingham. Neither does it warrant the trepidatious counsel of Justice Heydon, formerly of the High Court of Australia, who reasoned that judicial activism, taken to extremes, can spell the death of the rule of law.¹⁰³⁴ Indeed, ‘it is one thing to alter the law’s direction of travel by a few degrees, quite another to set it off in a different direction’.¹⁰³⁵ At its core, the notion of FLRT and its therapeutic integration into the criminal justice system is not sublimating the direction of the law, or vitiating rule-of-law principles.

VII CONCLUSION

This chapter has considered the theoretical implications of the integration of FLRT as a functional constituent of therapeutic jurisprudence. The rehabilitative emphasis of the treatment was elaborated with regard to historical and modern conceptions of punishment. The compatibility of the adversarial system with criminal law was examined in contrast to the reduced condemnatory emphasis inherent in the non-adversarial system, where therapeutic jurisprudence thrives.

¹⁰³² Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 593.

¹⁰³³ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 71.

¹⁰³⁴ Justice J D Heydon, ‘Judicial Activism and the Death of the Rule of Law’ [2003] (January–February) *Quadrant* 1.

¹⁰³⁵ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 71.

Rehabilitation theory and recidivism-reduction as theoretical impetuses to the scholarship of therapeutic jurisprudence were also considered. The relevance of international human rights theory and obligations to FLRT as a rehabilitative treatment for criminal offenders were additionally identified. Particular weight was given to the framework for applying human rights to correctional practice (in offender assessment and treatment), as developed by Ward and Birgden,¹⁰³⁶ and its relevance to the strength-based approach to offender-rehabilitation, the GLM, as established in Chapter 2. The compatibility of human rights theory with the therapeutic jurisprudence agenda in the promotion of socially acceptable and personally meaningful lives for offenders was addressed. Core ethical standards in the area of neuroscience, as derived from President Obama's charge to the Presidential Commission for the Study of Bioethical Issues, were raised.

A significant portion of the chapter analysed the theoretical implications of integrating FLRT into a criminal justice system governed by the rule of law. Indeed, there are concerns that therapeutic jurisprudence programs erode basic legal principles. Moreover, queries surround the extent to which the doctrine itself may be 'egregiously flawed'.¹⁰³⁷ '[M]ordant critique[s]',¹⁰³⁸ such as those posited by American academic Samuel Jan Brakel, maintain that the therapeutic jurisprudence philosophy 'lacks content', engages 'spurious verbal association', represents 'epistemological free-fall' and is 'mystical, if not occult'.¹⁰³⁹ It is conceded that the 'distinction between legitimate development of the law and an objectionable departure from settled principles may provoke sharp differences of

¹⁰³⁶ Tony Ward and Astrid Birgden, 'Human Rights and Correctional Clinical Practice' (2007) 12 *Aggression and Violent Behavior* 628.

¹⁰³⁷ Bruce Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' (2004) 11 *Psychiatry, Psychology And Law* 23, 24.

¹⁰³⁸ Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575, 588.

¹⁰³⁹ Samuel Jan Brakel, 'Searching for the Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 455, 467–8.

opinion’;¹⁰⁴⁰ however, therapeutic judges need not be viewed as a ‘bizarre amalgam’¹⁰⁴¹ forging an ‘unholy alliance’¹⁰⁴² when operating as part of a treatment team.

Indeed, there are varying degrees of incongruence between rule-of-law principles and therapeutic jurisprudence ideals. However, it is important to note that, notwithstanding this, both of those conceptions of law are valid, although markedly disparate in their bases, application and outcomes. Adopting an extreme perspective promoting unanimity with one, to the complete exclusion of the other, is perilous and counter-productive. It is unhelpful, for example, to conceive of therapeutic jurisprudence as possessing ‘all the attributes of a willed departure from a more direct, commonsense approach to the pertinent law’.¹⁰⁴³ Rather, the miscibility of therapeutic jurisprudence and rule-of-law principles is achieved by adding an emulsifier to stabilise the mixture. A ‘judicial emulsifier’ could blend therapeutic jurisprudence with rule-of-law principles in a functional legal emulsion.

Fidelity to the rule of law can be maintained despite the reticence of traditional adversarialism to accept a new therapeutic philosophy and methodology. Therapeutic jurisprudence need not violate independence, impartiality and integrity. Judging in problem-solving courts requires an involved judicial officer, some collaborative processes, and increased interaction between the judicial officer, participants, court team members and community members. If executed with care and consideration, judging in these courts in accordance with therapeutic jurisprudence may indeed enhance the therapeutic impact of substantive and procedural law, as well as augmenting the therapeutic impact of the roles played by judges, lawyers and clinicians,¹⁰⁴⁴ without being detrimental to the rule of law. These cautionary words of Raz are particularly apposite:

¹⁰⁴⁰ *Kleinwort Benson Ltd v Lincoln City Council* [1992] 2 AC 349.

¹⁰⁴¹ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous’ (2002) 29 *Fordham Urban Law Journal* 2063, 2066.

¹⁰⁴² Morris B Hoffman, ‘Commentary: The Drug Court Scandal’ (2000) 78 *North Carolina Law Review* 1437, 1524.

¹⁰⁴³ Samuel Jan Brakel, ‘Searching for the Therapy in Therapeutic Jurisprudence’ (2007) 33 *New England Journal on Criminal and Civil Confinement* 455, 458–9.

¹⁰⁴⁴ Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ in Ida Dickie, ‘Ethical Dilemmas, Forensic Psychology, and Therapeutic Jurisprudence’ (2008) 30 *Thomas Jefferson Law*

On the one hand if the pursuit of certain goals is entirely incompatible with the rule of law then these goals should not be pursued by legal means. But on the other hand one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.¹⁰⁴⁵

Despite their contrasting natures, therapeutic jurisprudence can be reconciled with the principles comprising the rule of law, despite the fact that:

The common law, and the kind of deference to tradition and precedent that defines it, is precisely this, a beaten path, deviations from which are forged only very slowly, cautiously, and with considerable judicial restraint.¹⁰⁴⁶

If the judiciary willingly and informedly apply both therapeutic jurisprudence concepts as well as rule-of-law principles, the role of courts as ‘the guardians of the longer-term tradition’,¹⁰⁴⁷ ‘of an all but sacred flame’,¹⁰⁴⁸ remains unspoiled. This is envisaged to assist in the preservation of all that is revered in the rule of law when mixing, as illustrated by Raz, ‘the fruits of long-established traditions with the urgencies of short-term exigencies’.¹⁰⁴⁹

Review Association 455, 456; David B Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008); Amy D Ronner, ‘The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome’ (2008) 24 *Touro Law Review* 601.

¹⁰⁴⁵ Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195, 211.

¹⁰⁴⁶ James L Nolan, ‘Therapeutic Adjudication’ [2002] *Society* 29, 31.

¹⁰⁴⁷ Joseph Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Clarendon Press, 1994) 376.

¹⁰⁴⁸ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 85.

¹⁰⁴⁹ Joseph Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Clarendon Press, 1994) 376.

CHAPTER 7

ON THE PRACTICALITIES OF INTEGRATING FLRT INTO THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

I INTRODUCTION

As foreshadowed in the introduction to Chapter 6, in addition to the question of the jurisprudential permissibility of FLRT-integration into the criminal justice system in Australia, a second major issue surrounding the recommendations in this thesis concerns the practical implications of integrating FLRT into the same. Such practical considerations form the focus of this chapter. To be sure, situating FLRT within therapeutic jurisprudence in practice illuminates the polarities between natural justice and ‘therapeutic justice’.

This chapter considers, in particular, the following practical issues that might inform the wisdom or merits of integrating FLRT into the criminal justice system:

- How are the roles of lawyers and judges altered in a therapeutic context?
- How are matters surrounding paternalism and coercion addressed in therapeutic justice?
- What is the impact of therapeutic jurisprudence concepts upon judicial integrity?
- What sentencing considerations surround the imposition of FLRT?
- What are the limitations relevant to the use of fMRI equipment and data-interpretation?

Cautions and criticisms of the emergent science are also examined. Deliberated further are staff-training and FLRT-administration in a clinical setting. This chapter also emphasizes that because FLRT is not a cure for impulsivity, treatment should be ongoing to prevent relapse. It is ultimately concluded that the practical difficulties, although extant, do not on balance outweigh the benefits of FLRT-integration into the Australian

criminal justice system, or at least justify our refusing to explore the merits of the possibility into the future.

II NATURAL JUSTICE AND THERAPEUTIC JUSTICE COMPARED

Used interchangeably with ‘natural justice’, ‘procedural fairness’ conceives of common law principles implied in relation to statutory and prerogative powers to ensure the fairness of the decision-making procedure of courts and administrators. It is thus necessary to examine the interaction of FLRT, positioned under therapeutic jurisprudence, with this established decision-making process.

The three rules of procedural fairness, or, ‘the obligation to accord procedural fairness by way of a hearing’,¹⁰⁵⁰ are: the hearing rule, the bias rule, and the no-evidence rule.¹⁰⁵¹ The adjudicative procedures used to determine cases should be fair. The principles of natural justice are guarantees of impartiality and objectivity,¹⁰⁵² intended to preserve the integrity of the judicial process.¹⁰⁵³ Arguably, natural justice is an embodiment of rule-of-law principles operationalized.

When practiced, therapeutic justice comprises therapeutic judging and lawyering, which differs substantially from the execution of natural justice in the adversarial system:

players’ roles are altered, modified, inextricably changed ... Legal justice becomes therapeutic jurisprudence.¹⁰⁵⁴

Court practices traditionally are formal, such that procedural fairness or the principles of natural justice are observed.¹⁰⁵⁵ Indeed, ‘formality does emphasise the solemnity and

¹⁰⁵⁰ *Murray v Legal Services Commission* (1999) 46 NSWLR 224.

¹⁰⁵¹ Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 350.

¹⁰⁵² H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 160.

¹⁰⁵³ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 209–10.

¹⁰⁵⁴ Jeff Rosnik quoted in James L Nolan, ‘Therapeutic Adjudication’ [2002] *Society* 29, 29.

¹⁰⁵⁵ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 217.

seriousness' of court and 'assists with predictability',¹⁰⁵⁶ representative of formalist indicia to the rule of law. However, it has been suggested that the law can become therapeutic only if the 'culture of critique' is replaced.¹⁰⁵⁷

Therapeutic justice advocates informality, whereby a casual atmosphere and vernacular are employed. In this way, the 'syntactical construction ... in the law's standard method of enquiry'¹⁰⁵⁸ is significantly challenged. The constituents of natural justice — the hearing rule, the bias rule, and the no-evidence rule — with respect to therapeutic justice are now considered.

A *The Hearing Rule and Therapeutic Lawyering Compared*

The first rule under natural justice or procedural fairness, is the hearing rule, which, it has been said, 'lies at the heart of the judicial process'.¹⁰⁵⁹ This refers to legal representation with no interest in the outcome of the matter. It further considers a right to representation by counsel and to the time and opportunity required to prepare a case.¹⁰⁶⁰ Based on the maxim *audi alteram partem*, a decision-maker must afford a person whose interests will be adversely affected by a decision an opportunity to present his or her case.

Therapeutic lawyering, in contrast, does not adhere to the hearing rule. Legal representatives are encouraged to engage in 'colloquy with the judge'¹⁰⁶¹ in advocating the most therapeutic outcome available to the offender. As proffered by Weinstein, the adversarial process and what legal actors do impact upon the psychological well-being or

¹⁰⁵⁶ Jelena Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown The Baby Out With The Bathwater?' (2007) 1 *eLaw Journal: Murdoch University Electronic Journal of Law* 60, 66 < http://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf >.

¹⁰⁵⁷ David B Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (1992) 40 *Cleveland State Law Review* 517, 530.

¹⁰⁵⁸ Bruce A Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' (2004) 11 *Psychiatry, Psychology and Law* 23, 32.

¹⁰⁵⁹ *South Australia v Totani* (2010) 242 CLR 1.

¹⁰⁶⁰ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press, 2011) 3, 6.

¹⁰⁶¹ David B Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (1992) 40 *Cleveland State Law Review* 517, 519.

emotional life of persons affected by the law.¹⁰⁶² The adversarial process is deemed antithetical to obtaining appropriate services for the individual,¹⁰⁶³ so the roles of all actors in the system change. In particular, ‘a variety of psychologically-oriented approaches’ are employed, including ‘empathy, respect, motivational interviewing, and behavioural contracting to motivate individuals to accept needed treatment and respond effectively to it’.¹⁰⁶⁴ Defence lawyers are expected ‘to shed their staunch adversarialism’¹⁰⁶⁵ to become ‘therapeutic change agents’¹⁰⁶⁶ representing their clients in a manner reflective of the therapeutic goals of the movement. Furthermore, therapeutic jurisprudence ‘eschews the argument culture’¹⁰⁶⁷ peculiar to the adversarial system and instead advocates the birth of the ‘affective lawyer’¹⁰⁶⁸ and the ‘preventive lawyer’¹⁰⁶⁹ who quell the otherwise ‘perfunctory manner’ of counsel.¹⁰⁷⁰ Indeed, ‘[what] was so sacrosanct’ in the adversarial arena ‘has changed so drastically’.¹⁰⁷¹

The need for an independent legal profession, ‘fearless in its representation’,¹⁰⁷² is arguably of greater import to the justice system than ‘humanising’ lawyers by viewing

¹⁰⁶² See Marjorie Silver, ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’ (1999) 6 *Clinical Law Review* 259, 293–4; See also Janet Weinstein, ‘And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System’ (1999) 52 *University of Miami Law Review* 79.

¹⁰⁶³ John Petrila et al, ‘Preliminary Observations from an Evaluation of the Broward County Mental Health Court’ (2001) 37 *Court Review* 14, 20.

¹⁰⁶⁴ See Bruce J Winick, ‘A Therapeutic Jurisprudence Model for Civil Commitment’ in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 24, 52.

¹⁰⁶⁵ Tamar Meekins, ‘Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender’ (2007) 12 *Berkeley Journal of Criminal Law* 75, 78.

¹⁰⁶⁶ David B Wexler, ‘Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defence Lawyer’ (2005) 17 *Saint Thomas Law Review* 743, 745–6.

¹⁰⁶⁷ Shirley Abrahamson, ‘The Appeal of Therapeutic Jurisprudence’ in Bruce Arrigo, ‘The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime’ (2004) 11 *Psychiatry, Psychology and Law* 23, 30.

¹⁰⁶⁸ Bruce J Winick, ‘A Legal Autopsy of the Lawyering in Schiavo: a Therapeutic Jurisprudence/Preventive Law Rewind Exercise’ (2007) 61 *University of Miami Law Review* 595, 600.

¹⁰⁶⁹ Bruce J Winick and David B Wexler, ‘The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic’ (2006) 13 *Clinical Law Review* 610, 617.

¹⁰⁷⁰ David B Wexler, ‘Justice, Mental Health, and Therapeutic Jurisprudence’ (1992) 40 *Cleveland State Law Review* 517, 524.

¹⁰⁷¹ James L Nolan, ‘Therapeutic Adjudication’ [2002] *Society* 29, 29.

¹⁰⁷² Lord Bingham, *The Rule of Law* (Penguin Books, 2011) 92–3.

law as a ‘helping profession’.¹⁰⁷³ The rehabilitation-centred lawyering of the ‘therapeutic jurisprudence criminal lawyer’¹⁰⁷⁴ conflicts with the accused’s right to unbiased representation.¹⁰⁷⁵ Although Wexler and Winick consistently stress that therapeutic jurisprudence does not seek ‘to transmogrify lawyers into counselors or mental health professionals’,¹⁰⁷⁶ there is legitimate concern surrounding disavowal of the hearing rule. Chief Justice Spigelman has suggested that the judiciary and legal profession are ‘interrelated in a symbiotic manner’.¹⁰⁷⁷ Therefore, a strong and independent legal profession contributes to a strong and independent judiciary, the maintenance of which is crucial to judicial integrity and wider constitutional considerations.

Like magistrates, lawyers operating in a therapeutic jurisprudence context need to see their client’s case in more than simply adversarial terms.¹⁰⁷⁸ Lawyers must understand and appreciate the client’s issues and problems and the potential (therapeutic) solution to them. In general, proceedings in courts governed by the principles of therapeutic jurisprudence are non-adversarial; therefore, any factual or legal disputes should be disposed of prior to the participant being referred to the program. If this is achieved, it will mean that all members of the court, including the prosecution and defence, can focus on the same agenda, namely, achieving the most therapeutic outcome for each participant.¹⁰⁷⁹ In achieving this goal, it may sometimes be necessary for the lawyers to work closely with a number of mental health professionals (for example, Forensic Mental

¹⁰⁷³ Bruce J Winick, ‘A Legal Autopsy of the Lawyering in Schiavo: a Therapeutic Jurisprudence/Preventive Law Rewind Exercise’ (2007) 61 *University of Miami Law Review* 595, 600–1.

¹⁰⁷⁴ David B Wexler, ‘Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defence Lawyer’ (2005) 17 *Saint Thomas Law Review* 743, 746.

¹⁰⁷⁵ Mae C Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 571.

¹⁰⁷⁶ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence Part II* (Carolina Academic Press, 2003) xvii.

¹⁰⁷⁷ Chief Justice James Spigelman, ‘The Rule of Law in the Asian Region’ in T D Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998–2008* (CS2N Publishing, 2008) 55.

¹⁰⁷⁸ M King, ‘Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education’ (2006) 15 *Journal of Judicial Administration* 129, 130 and 136.

¹⁰⁷⁹ J Popovic, ‘Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary’ (2003) 20 *Law in Context* 121, 128.

Health Court Liaison Officers).¹⁰⁸⁰ This enables practitioners to be aware of the issues surrounding the treatment and care of the defendant.

B *The Bias Rule and Therapeutic Judging Compared*

The bias rule is the principle that a decision-maker must not have an interest in the outcome of the decision or an appearance of bias.¹⁰⁸¹ Bias is a pre-existing favourable or unfavourable attitude to an issue when impartial consideration of the merits of the case is required. As Lord Bingham has observed, adjudicative procedures provided by the state should be fair.¹⁰⁸² Fairness further dictates that decisions are made by adjudicators who, however described, are independent and impartial. Independence signifies the freedom to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure. Impartiality connotes open-mindedness, unbiased by any personal interest or partisan allegiance of any kind. '[Impartiality is] the supreme judicial virtue'¹⁰⁸³ and ideally, 'a judge should stay out of the arena'.¹⁰⁸⁴

The bias rule also speaks to judicial integrity, addressed below, which concerns independence, impartiality and certainty. This requires that there be no conflict of interest and no actual or apprehended bias.¹⁰⁸⁵ It also requires judicial decision-makers to alert themselves to, and to neutralise as far as practicable, personal predilections or prejudices or any extraneous considerations that might pervert their judgement.¹⁰⁸⁶ Manifested through the bias rule, the judiciary is not to be personally interested in the outcome of the case in favour of any of the participants.

¹⁰⁸⁰ M King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129, 130 and 137.

¹⁰⁸¹ Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 51.

¹⁰⁸² Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 80.

¹⁰⁸³ Patrick Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1, 4.

¹⁰⁸⁴ *Director of Public Prosecutions v Humphrys* [1977] AC 1, 26.

¹⁰⁸⁵ Lord Bingham, *The Rule of Law* (Penguin Books, 2011) 93; M Warren, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 482; S Rares, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 137–8.

¹⁰⁸⁶ Lord Bingham, *The Rule of Law* (Penguin Books, 2011) 93.

The philosophical basis of judicial integrity is most succinctly found in the judicial oath by which judges swear or affirm to act ‘without fear or favour, affection or ill will’.¹⁰⁸⁷ This is a strong promise of impartiality. The oath also contains a promise to ‘do justice according to law’, which is a clear requirement that the judge is to apply the law rather than follow personal inclination or preference.¹⁰⁸⁸

The concept of a judicial officer as an impartial and uninvolved arbiter of adversarial proceedings endures as a measurement for proper conduct of judicial officers. This is evident in the Australian Guide to Judicial Conduct, where the elaboration of judicial conduct centres around conduct in trial. It equates the judicial value of impartiality with the judicial officer seeking to ‘avoid stepping into the arena’.¹⁰⁸⁹ Chapter 4 of the Guide also stresses moderation in judicial involvement in the proceedings:

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.¹⁰⁹⁰

In contrast to the bias rule, therapeutic jurisprudence calls for emotionally intelligent judging¹⁰⁹¹ requiring ‘empathy, respect, active listening, clarity, a positive focus and non-paternalism’.¹⁰⁹² Adopting a coach-like role, the ‘ambitious scope’¹⁰⁹³ of therapeutic judging requires judges ‘to wear the hat of lawyer, sociologist, psychologist and even psychoanalyst’.¹⁰⁹⁴ In this way, the adversarial ‘court-craft’¹⁰⁹⁵ known to the judiciary and embodied in the bias rule is abandoned. In its place the judge plays a role as a

¹⁰⁸⁷ J B Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 10.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct Second Edition* (2007) <[http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct(2ndEd).pdf)> 3.

¹⁰⁹⁰ Ibid 17.

¹⁰⁹¹ Meredith Rossner and David Tait, ‘Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures’ (2011) 37 *Monash University Law Review* 241, 258.

¹⁰⁹² Mark Harris, ‘The Koori Court and the Promise of Therapeutic Jurisprudence’ (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 130, 134 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹⁰⁹³ James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?’ (2011) 35 *Melbourne University Law Review* 394, 395.

¹⁰⁹⁴ Ibid.

¹⁰⁹⁵ Jelena Popovic, ‘Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary’ (2002) 20 *Law in Context* 121, 128.

member of a treatment team, the lawyers are not partisans, and the non-legal team members enjoy interaction with the participant.¹⁰⁹⁶ This departure from the customary adversarial system reflects the design of the specialty court, which discourages any challenge, argument or assertion of rights that may interfere with the course of treatment.¹⁰⁹⁷ Rather, ‘[d]irect engagement, empathy and communication’¹⁰⁹⁸ are promoted.

In general, Australia’s adversarial legal system is purported to have a deleterious effect on the mental health and emotional well-being of offenders.¹⁰⁹⁹ Legal processes are considered ‘alienating and disempowering’, as offenders are rushed through the court system without an opportunity to voice or explain their position. Court processes deny defendants an opportunity to express what might be appropriate for him or her to curtail offending behaviour.¹¹⁰⁰ ‘Managerial and interventionist in its approach’,¹¹⁰¹ therapeutic jurisprudence emboldens court players to act therapeutically.¹¹⁰² Accordingly, the importance of voice and validation¹¹⁰³ in the court context is highlighted. Voice encompasses an environment where the participant can tell his or her story to an attentive court.¹¹⁰⁴ Validation involves the court acknowledging that it has heard the participant, values his or her contribution, and will take his or her story into

¹⁰⁹⁶ James L Nolan, ‘Reinventing Justice: The American Drug Court Movement’ in Tamar Meekins, ‘Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender’ (2007) 12 *Berkeley Journal of Criminal Law* 75, 91.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ Sharyn Roach Anleu and Kathy Mack, ‘Australian Magistrates, Therapeutic Jurisprudence and Social Change’ (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 173.

¹⁰⁹⁹ David B Wexler, ‘Therapeutic Jurisprudence’ (2004) 20 *Touro Law Review* 356.

¹¹⁰⁰ Ibid.

¹¹⁰¹ Andrew Cannon, ‘Smoke and Mirrors or Meaningful Change: The Way Forward for Therapeutic Jurisprudence’ (2008) 17 *Journal of Judicial Administration* 217, 219.

¹¹⁰² Michael King, ‘Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective’ (2007) 31 *Criminal Law Journal* 12, 13.

¹¹⁰³ John Petrila et al, ‘Preliminary Observations from an Evaluation of the Broward County Mental Health Court’ (2001) 37 *Court Review* 14, 20.

¹¹⁰⁴ Michael S King, ‘The Therapeutic Dimension of Judging: The Example of Sentencing’ (2006) 16 *Journal of Judicial Administration* 92, 95; Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 129.

account.¹¹⁰⁵ Extensive literature¹¹⁰⁶ on the psychology of procedural justice demonstrates that when people are treated fairly, with dignity and respect, and given a sense of voice and validation, it is more likely that greater therapeutic efficacy will be achieved. In some instances, judges may also be required to exercise cultural sensitivity, employing vision and expertise beyond legal skills to understand participants' needs, based on cultural, social and geographical differences.¹¹⁰⁷ It thus follows that therapeutic judging converts 'dispassionate, disinterested magistrates' to 'sensitive, emphatic counsellors'.¹¹⁰⁸

Judge Van de Veen of Canada and Professor Wexler claim that in the therapeutic jurisprudence context, the criminal act must be condemned, not the offender.¹¹⁰⁹ Relatedly, disparaging remarks in court are viewed unfavourably. Therapeutic judging suggests that if a judge plants a 'helpful seed'¹¹¹⁰ at a 'teachable moment'¹¹¹¹ in the offender's presence, reoffending rates will decline, community fears will allay, and trust in the criminal justice system will be restored.¹¹¹² However, the principles guiding judicial conduct generally are influenced by the concept of an adversarial trial¹¹¹³ whereby 'rule-oriented' judges find difficulty in 'deviating from the usual process of

¹¹⁰⁵ Michael S King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 95.

¹¹⁰⁶ Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in David Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (1992) 40 *Cleveland State Law Review* 517, 521.

¹¹⁰⁷ Michael King, 'Applying Therapeutic Jurisprudence in Regional Areas — The Western Australian Experience' (2003) 10(2) June *eLaw Journal: Murdoch University Electronic Journal of Law* para. 23. 37 <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>>.

¹¹⁰⁸ David Rottman, 'Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?' (2002) *Court Review* 26, 30.

¹¹⁰⁹ Sherry Van de Veen and David B Wexler, 'Therapeutic Jurisprudence Sentencing Principles in a Canadian Context' (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006).

¹¹¹⁰ Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* in David B Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) *Court Review* 20, 22.

¹¹¹¹ Pamela Casey and David Rottman, 'Therapeutic Jurisprudence in the Courts' (2000) 18 *Behavioral Sciences and the Law* 446, 449.

¹¹¹² *Ibid* 447.

¹¹¹³ Michael S King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133, 133.

decision-making predicated upon legal rules'.¹¹¹⁴ It is argued that judges cannot effectively act as impartial and detached magistrates to hear and rule on the competing claims of adversaries when they also function as advocates and defenders of the very programs and procedures under scrutiny.

It follows that increased judicial interaction with a participant heightens the possibility of partiality.¹¹¹⁵ Emotional engagement involved in therapeutic judging, especially judicial monitoring of success and failure in a treatment program, may conflict with neutrality. Advisedly, James Duffy recommends that judicial impartiality should be assessed according to the quality of involvement and intervention rather than the quantum.¹¹¹⁶ Essentially, each individual problem-solving court judge is charged with the task of ensuring that the processes they administer and the behaviour they present are consistent with the aspirational ideals of impartiality.¹¹¹⁷ Indeed, it is the 'romantic judge' who employs therapeutic justice:

The classical judge characterized by impartiality, prudence, practical reason, mastery of craft ... and above all, self restraint has given way to the romantic judge who is disposed instead to be bold, creative, compassionate, result-oriented, and liberated from legal technicalities. The romantic judge is less bound by tradition, by precedent, and by a cautious and careful approach to judicial decision making. The traditional ideals of disinterest, humility, and restraint have given way to the new ideals of judicial boldness, energy, and compassion.¹¹¹⁸

The adversarial system 'reflects values that respect both the autonomy of parties to the trial process and the impartiality of the judge'.¹¹¹⁹ This system of law relies on the skill of each advocate in representing the interests of the client and shielding the client against self-incrimination. The rules of evidence are upheld to avoid prejudicing the trier of fact. In this manner, facts and culpability surrounding the commission of an offence form the bases of adversarialism. Therapeutic judging, however, adopts a non-adversarial

¹¹¹⁴ Mark Harris, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 130, 134 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹¹¹⁵ Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 173–88.

¹¹¹⁶ James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?' (2011) 35 *Melbourne University Law Review* 394, 415.

¹¹¹⁷ *Ibid* 419.

¹¹¹⁸ James L Nolan, 'Therapeutic Adjudication' [2002] *Society* 29, 31–2.

¹¹¹⁹ *Doggett v The Queen* (2001) 208 CLR 343, 346 (Gleeson CJ).

approach. The legal fraternity is ordinarily reluctant to act in a non-adversarial setting, as it may threaten the judicial values of impartiality, fairness and certainty.¹¹²⁰ However, the goal of therapeutic judging is based on treatment and attaining therapeutic outcomes, not upon an impartial final determination. An interactive judge and treatment team collectively devise a treatment plan maximizing the therapeutic outcomes to advance the well-being of the offender.

Wexler asserts that therapeutic jurisprudence avoids ‘doctrinal niceties and symmetries in favour of looking at a problem and ... develop[ing] reasonably workable solutions’.¹¹²¹ At its core, therapeutic jurisprudence advocates the departure from the ‘argument culture’ characteristic of the adversarial system toward ‘a culture of dialogue, cooperation, and other approaches of intellectual inquiry’.¹¹²² Considered to be ‘centrist’, therapeutic jurisprudence strives to ‘probe beneath a rhetoric of rights and to focus instead on needs and interests, all the while seeking a creative convergence or compromise’.¹¹²³

Therapeutic jurisprudence seeks to give offenders a ‘voice, respect, neutrality and trust’.¹¹²⁴ Its processes are also associated with ‘active and positive intervention, validation and self-worth’.¹¹²⁵

Studies and reports have shown that how a magistrate or judge behaves at a hearing can affect whether an offender complies with the particular order handed down.¹¹²⁶ Wexler argues that the level of language the magistrate uses, and the amount of direct dialogue that he or she chooses to engage in with the offender, can have a direct impact on the

¹¹²⁰ Arie Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205, 222.

¹¹²¹ David B Wexler, ‘Therapeutic Jurisprudence and the Culture of Critique’ (1999) 10 *Journal of Contemporary Legal Issues* 263, 272.

¹¹²² Ibid 274.

¹¹²³ Ibid 273.

¹¹²⁴ Kevin Burke, ‘Just What Made Drug Courts Successful?’ (2010) 36 *Criminal and Civil Confinement* 39.

¹¹²⁵ Julia Foster, ‘The Drug Court: ‘A Police Perspective’ in Transforming Legal Processes in Court and Beyond (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 115.

¹¹²⁶ M King, ‘Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education’ (2006) 15 *Journal of Judicial Administration* 129, 130.

offender's understanding of, and compliance with, any order made against them. Open and inclusive communication is one of the key principles in a problem-solving court system. Speaking in simple terms, including the offender in discussions about his or her case and ensuring the comfort of all parties are some of the simple, yet essential, therapeutic jurisprudence approaches that ought to be adopted by magistrates in problem-solving courts.¹¹²⁷

Other reports highlight the need for the magistrate, as well as prosecution and defence lawyers, to be able to listen to, and understand, the offender's view of the world. The magistrate may also need to make direct enquiries of the offender's personal circumstances.¹¹²⁸ This will allow the magistrate to understand and/or have an appreciation of the (subjective) motivation and actions of the offender.¹¹²⁹ It is also seen as preferable to have the same magistrate throughout the operation of the bail order, that is, ensuring that the same dedicated magistrate conducts the reviews and finalizes the case. Having a 'rapid succession of reluctant and unsympathetic judges or magistrates' is particularly counter-productive and detrimental for the participants in a therapeutic problem-solving court.¹¹³⁰

Sanctioning or rewarding particular behaviour is another important part of the therapeutic jurisprudence approach to particular offenders. Magistrates (and other officers of the court) need to be aware that paying too much attention to non-compliant offenders may reinforce or encourage such behaviour, while ignoring or paying too little attention to cooperative behaviour may discourage the kind of positive behaviour they seek from offenders.¹¹³¹

¹¹²⁷ J Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121, 129.

¹¹²⁸ Ibid.

¹¹²⁹ Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 16.

¹¹³⁰ Ibid 12–19.

¹¹³¹ A Allan, 'The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis' (2003) 20 *Law in Context* 24, 35.

The introduction of therapeutic judging has required judicial officers to adapt to a different way of judging. Legislation and court rules governing these court processes generally provide little guidance as to how the judicial officer is to interact with participants. Traditional legal education, judicial education and the legal literature has not provided guidance to judging in a therapeutic manner, although some judicial officers have at times taken a therapeutic approach. Judging in a therapeutic manner should, as with other forms of judging, be based upon proper principles rather than the unfettered discretion of the judicial officer. There is an emergent literature suggesting proper principles to be applied in judging in problem-solving courts and in taking a solution-based approach to judicial conduct in mainstream courts based on evidence from procedural justice research and the behavioural sciences. It is likely that these ‘care-based judicial alternatives’¹¹³² require legal education and professional development to instil ‘wise ways of dealing with the emotions’ and responses to ‘conflicts in a less adversarial way’.¹¹³³

Therapeutic jurisprudence requires a different approach to the administration of justice, albeit a definitive description of personnel re-education and a radical departure from the adversarial legal process. These effects, which Nolan refers to as ‘judicial reorientation’, call into question ‘the saliency of concepts that once more profoundly define the substance and scope of criminal law’.¹¹³⁴ Judges and lawyers would be less constrained than by having to be impartial in an adversarial system governed by clearly defined roles, robes, schedules and power relations.

Problem-solving courts have used processes that promote goals far broader than the handing down of a judgment or the imposition of a sentence resulting from the determination of the facts and the application of the relevant law to the facts. With these new processes come new forms of judging and advocacy, and the application of

¹¹³² Candace McCoy, ‘The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts’ (2003) 40 *American Criminal Law Review* 1515.

¹¹³³ Robin Tapper, ‘The Peacemaking Virtues of Good Lawyers in the Adversarial Process’ (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 128.

¹¹³⁴ James L Nolan, ‘Drug Treatment Courts and the Disease Paradigm’ (2002) 37 *Substance Use and Misuse* 1723, 1747.

interpersonal and intrapersonal skills that historically have not been associated with the judiciary or the legal profession. Arguably, judging in these contexts requires the judicial officer to be mindful of the effect of the processes they use on the well-being of those involved. In addition, the novel situations faced by judicial officers when judging in these courts or in certain situations when interacting with others outside court raises issues concerning the values that underlie these forms of judging, whether the processes are consistent with the judicial function, and how to resolve particular challenges without compromising judicial values or the goals of these programs.

Problem-solving courts appear to depart from core aspects of the judicial function of resolving legal problems by a determination of the facts and the applicable law and the application of the law to the facts to reach a judgment. However, it is argued that they enhance the fact-finding and decision-making processes.¹¹³⁵ Creative strategies generate therapeutic outcomes while operating within the parameters of ‘just’ decision-making. In fact, ‘[p]roblem solving courts emphasise traditional due process protections during the adjudication phase of a case and the achievement of tangible, constructive outcomes post-adjudication. In doing so, problem-solving courts have sought to balance fairness and effectiveness, the protection of individual rights and the preservation of public order.’¹¹³⁶ For these shifts to have support, therapeutic jurisprudence proponents have outlined the required re-education process for judges and lawyers. King and Wilson advocate therapeutic jurisprudence training as ‘part of the education of legal practitioners and law students’.¹¹³⁷ Tapper proposes that legal education and professional development instil ‘wise ways of dealing with the emotions’ and responses to ‘conflicts in a less adversarial way’.¹¹³⁸

¹¹³⁵ Michael S King, ‘Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts’ (2010) 19 *Journal of Judicial Administration* 133, 134.

¹¹³⁶ E Mendelle, ‘Policy Framework to Consolidate and Extend Problem Solving Approaches in Victorian Courts’ (Report, Department of Justice, 2004).

¹¹³⁷ Michael S King and Stephen Wilson, ‘Country Magistrates’ Resolution on Therapeutic Jurisprudence’ (2005) 32 *Brief* 23, 25.

¹¹³⁸ Robin Tapper, ‘The Peacemaking Virtues of Good Lawyers in the Adversarial Process’ (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 128.

By recognizing differing needs, implementing alternatives and assessing outcomes, therapeutic jurisprudence is declared a viable alternative to the adversarial system. A ‘holistic’¹¹³⁹ perspective is posited as empowering offenders to address their own rehabilitative needs. Therapeutic jurisprudence in Australia has required considerable modification at each stage of the process — recognition, practice and assessment — and to the philosophical approach, court structures and roles, and work-loads of court personnel. New skill sets are required that ‘deliberately embrace the emotional dimensions of the dynamic between lawyer and client’.¹¹⁴⁰

The benefits to an offender of being part of a therapeutic environment are plain, yet matters surrounding coercion and voluntariness are routinely raised. Advocates of therapeutic jurisprudence acknowledge the increased involvement of the judiciary in a therapeutic context and emphasize that the offender, too, has an interactive role in the process. Myths of coercion are dispelled by the ventilation of concerns around program-participation and expectation — executed with transparency and vigour.

1 *Paternalism and Coercion*

Some problem solving court judges [employ] “benevolent coercion,” and extol the virtues of judicial coercion as an essential ingredient in the rehabilitative enterprise.¹¹⁴¹

While conventional, high-volume lower courts may be ‘routinized, impersonal, and anonymous, [they are] also much less intrusive and paternalistic’.¹¹⁴² Therapeutic

¹¹³⁹ Michael S King and Steve Ford, ‘Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime’ (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 11 <<http://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>; Michael S King, ‘Applying Therapeutic Jurisprudence in Regional Areas — The Western Australian Experience’ (2003) 10(2) June *eLaw Journal: Murdoch University Electronic Journal of Law* para 37 <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>>.

¹¹⁴⁰ Mark Harris, ‘The Koori Court and the Promise of Therapeutic Jurisprudence’ (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 130, 134 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹¹⁴¹ Jeffrey Tauber, ‘Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence’ (2002) 29 *Fordham Urban Law Journal* 1755, 1901.

¹¹⁴² James Chriss, ‘The Drug Court Movement: An Analysis of Tacit Assumptions’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 189, 199.

jurisprudence adopts an ‘arguably paternalistic’¹¹⁴³ approach. To ‘strive to avoid the perception of coercion’,¹¹⁴⁴ judicial attention should be paid to ensuring that individuals are explicitly informed when deciding to enter the court’s jurisdiction. This is not only because of a philosophic commitment to voluntary treatment, but also because agreement to participate in the court may often mean the waiver of speedy trial and other rights available in a criminal context.¹¹⁴⁵

The deployment of therapeutic jurisprudence can lead to the behavioural manifestation of partiality and bias on the part of problem-solving court judges. Unsurprisingly, this approach is considered to be ‘legally sanctioned coercion’.¹¹⁴⁶ Coercion is a contentious matter, especially in the mental health diversion court, for example, which concerns mental impairment and voluntariness. Voluntariness is based on the rights of the individual to refuse treatment, and upon the premise that people are more likely to succeed on such a program if they actively choose to be part of it, rather than being coerced into participation.¹¹⁴⁷ However, Winick claims that diversion into treatment ‘is not legal coercion, and, if properly applied, the individual may not even experienced it as psychologically coercive’.¹¹⁴⁸

The ‘voluntary’ nature of the participation of the offender in diversion programs has been questioned and it has been suggested that the more severely impaired individual may not be competent to make decisions about participation.¹¹⁴⁹ Most critics of the mental health court system argue that the effect of offering treatment instead of imprisonment leaves

¹¹⁴³ John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 881.

¹¹⁴⁴ Susan Stefan and Bruce J Winick, ‘A Dialogue on Mental Health Courts’ (2005) 11 *Psychology, Public Policy, and Law* 507, 516.

¹¹⁴⁵ Norman Poythress et al, ‘Perceived Coercion and Procedural Justice in the Broward Mental Health Court’ (2002) 25 *International Journal of Law and Psychiatry* 517, 530.

¹¹⁴⁶ John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 881.

¹¹⁴⁷ Nichole Hunter and Helen McRostie, ‘Magistrates Court Diversion Program, Overview of Key Data Findings’ (2001) 20 *Office of Crime Statistics and Research* 1, 4.

¹¹⁴⁸ Bruce J Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2003) 30 *Fordham Urban Law Journal* 1055, 1076.

¹¹⁴⁹ David James, ‘Court Diversion in Perspective’ (2006) 40 *Australian and New Zealand Journal of Psychiatry* 529, 533.

little room for choice by the offender.¹¹⁵⁰ The MacArthur study of coercion found that ‘mentally ill offenders who freely choose to obtain treatment rather than being treated against their will may be more committed to treatment objectives, thus benefiting more consistently from it’.¹¹⁵¹

The offender has an important role in any therapeutic jurisprudence approach to court proceedings. For a problem-solving court to be successful, it is essential that each offender understand his or her role, and that of every other key player in the process. In a problem-solving court, the offender often has an active, not passive, role and it is important that they appreciate that how they behave while participating in the diversion program will have particular consequences.

It is imperative that every participant in a problem-solving court has been fully informed of the process and has freely consented to take part in the process. People who are coerced or forced into treatment may resent such intrusion and be less likely to want to resolve the underlying issues (such as addressing their mental health problems or substance abuse issues) that relate to their offending behaviour.¹¹⁵²

Therapeutic jurisprudence emphasizes the importance of self-determination in relation to addressing such problems. The principle of self-determination can be promoted within the curial context in a number of ways: giving an offender the (coercion-free) option of participating in a diversion program; encouraging the participant to contribute to the setting of goals and treatment strategies; and allowing the participant the opportunity to report on his or her own progress.¹¹⁵³

¹¹⁵⁰ John Monahan et al, ‘Mandated Community Treatment: Beyond Outpatient Commitment’ in Christian Keele, ‘Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System’ (2002) 71 *University of Missouri Kansas City Law Review* 193, 200.

¹¹⁵¹ LeRoy Kondo, ‘Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Jurisprudence for Mentally Ill Offenders’ (2001) 28 *American Journal of Criminal Law* 255, 264.

¹¹⁵² M King, ‘Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education’ (2006) 15 *Journal of Judicial Administration* 129, 130 and 131.

¹¹⁵³ Ibid.

Some research indicates that participants in problem-solving courts are more compliant with the orders they receive, and benefit more from the whole process, if they are encouraged to view the process as entering into a kind of ‘social contract’ that they have made a (public) commitment to comply with.¹¹⁵⁴ Their level of compliance can be heightened by the fact that the contract is made with someone in authority (a magistrate) who is above and beyond those who they normally make such ‘contracts’ with (a health-care provider).¹¹⁵⁵

The structure of the program and the requirement for regular reviews mean that a successful referral to a MHDCT may actually increase, rather than minimize, the number of contacts a participant has with the criminal justice system. By agreeing to participate in a MHDCT, defendants have generally accepted a much higher level of involvement with the criminal justice system. In some circumstances this will include greater intrusion into their personal lives than they would have experienced if their matters had been dealt with in an ‘ordinary’ manner.¹¹⁵⁶

2 *Guilty Plea — Unnecessary*

The diversionary mechanisms operative in Victoria, South Australia, Western Australia and Tasmania all stipulate that program participation is voluntary and entry is not conditional upon a guilty plea. Yet, treating an offender for his or her own good without a guilty plea may subvert an offender’s rights to autonomy and voluntariness. As therapeutic jurisprudence courts institute ‘voluntary’ treatment programs, attention is diverted from the court system, with the guilt and innocence of parties as its essence.¹¹⁵⁷ Lamentable are the perspectives that consider ‘[t]hese various methods of applying court treatment without a full and fair judicial trial of the issue of guilt of a particular offense,

¹¹⁵⁴ Ibid 130.

¹¹⁵⁵ Ibid.

¹¹⁵⁶ Esther Newitt and Victor Stojcevski, ‘Mental Health Diversion List’ (Evaluation Report, Magistrates Court Tasmania, May 2009) 34.

¹¹⁵⁷ See Morris B Hoffman *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous* (2002) 29 *Fordham Urban Law Journal* 2063.

... to be peculiarly hazardous'.¹¹⁵⁸ As previously stated, operating in a therapeutic jurisprudence framework does not disregard judicial process or offender rights — it is the shift in emphasis upon rehabilitation and treatment that are promoted.

C *The No-Evidence Rule and Therapeutic Evidence Compared*

The principle that an administrator's decision must be based on logically probative evidence¹¹⁵⁹ is the basis of the no-evidence rule. A hearing by an impartial tribunal is required to act on the basis of evidence and argument presented formally before it, in relation to legal norms that govern the matters such as the imposition of penalty.¹¹⁶⁰ This rule further concerns the following: a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;¹¹⁶¹ a right to present evidence on one's own behalf;¹¹⁶² a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;¹¹⁶³ a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it;¹¹⁶⁴ and some right of appeal to a higher tribunal of a similar character.¹¹⁶⁵

The evidence accepted under the therapeutic jurisprudence model, in contrast, is broad and encompasses societal matters. In this way, traditional rules of evidence are not employed. It is argued that, '[a]llow[ed] in evidence [are] matters which would be considered prejudicial, incompetent, and irrelevant for purposes of proof in the usual criminal trial.'¹¹⁶⁶

¹¹⁵⁸ Paul W Tappan, 'Treatment Without Trial' (1946) 24 *Social Forces* 306, 309.

¹¹⁵⁹ Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 305.

¹¹⁶⁰ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press, 2011) 3, 6.

¹¹⁶¹ *Ibid.*

¹¹⁶² *Ibid.*

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ Paul W Tappan, 'Treatment Without Trial' (1946) 24 *Social Forces* 306, 307.

Furthermore, it is necessary that courts should bear in mind the prevention of abuse of process and the power of judicial review.¹¹⁶⁷ This also ensures conformity to the rule of law, as courts should have supervisory jurisdiction to review both parliamentary and subordinate legislation, as well as rules and executive action.¹¹⁶⁸

D *Judicial Integrity*

Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.¹¹⁶⁹

Natural justice, operative under the omnipotent Diceyan principles, as addressed in Chapter 6, must also strive to uphold judicial integrity, comprising independence, impartiality and certainty. Impartiality has been addressed under the bias rule above.

1 *Independence*

According to Raz, ‘the independence of the judiciary must be guaranteed’.¹¹⁷⁰ Faithful adherence to independence, impartiality and certainty sustains the integrity of the judiciary. Judicial independence is freedom from direction, control or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government.¹¹⁷¹ Accordingly, judicial independence is considered a safeguard of individual liberty and a fundamental attribute of constitutional government. Independence relates to the constitutional situation of the judiciary and to the approach

¹¹⁶⁷ Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195, 201.

¹¹⁶⁸ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 217; Murray Gleeson, ‘Courts and the Rule of Law’ (Paper presented at the Rule of Law Series, Melbourne University, 7 November 2001) 5.

¹¹⁶⁹ Francis Bacon, *Essays, Civil and Moral* (Collier and Son, 1909–14).

¹¹⁷⁰ Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195 (1977) reprinted by Keith Culver, *Readings in the Philosophy of Law* (1999) 13.

¹¹⁷¹ Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 249.

and actions of individual members of the judiciary:¹¹⁷² legally trained judicial officers whose independence of other agencies of government is assured.¹¹⁷³

On an individual level, judges must be and be seen to be independent of the influence of the executive and legislative branches of government. Being independent of outside influence is also an aspect of impartiality and speaks to the integrity and character of the judicial officer. The integrity and function of the executive and legislative branches of government are also be respected by the judiciary.

An essential component of a system governed by law is the existence of an independent and impartial judiciary to apply the law to cases brought before it and whose judgment in those cases is final and conclusive.¹¹⁷⁴ There must be separation between executive and judicial functions.¹¹⁷⁵ The legislature cannot confer upon the judiciary, executive or administrative functions incompatible with the essential and defining characteristics of courts and the courts' place in a national integrated judicial system.¹¹⁷⁶ The legislature cannot confer judicial functions upon the executive.¹¹⁷⁷ The legislature is constrained in removing or confining the judiciary's supervisory jurisdiction over executive conduct.¹¹⁷⁸ The judiciary cannot engage in legislative rule-making.¹¹⁷⁹

At its core, therapeutic justice is less concerned with the partitioning of executive and judicial functions, than with seeking to promote offender-rehabilitation. FLRT, arguably

¹¹⁷² Australasian Institute of Judicial Administration, *Guide to Judicial Conduct Second Edition* (2007) <[http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct(2ndEd).pdf)> 5–6.

¹¹⁷³ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press, 2011) 3, 6.

¹¹⁷⁴ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 216–17; J Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 210; T Bingham, *The Rule of Law* (Penguin Books, 2011) 91–2; M Warren, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 481.

¹¹⁷⁵ Murray Gleeson, 'Courts and the Rule of Law' (Paper presented at the Rule of Law Series, Melbourne University, 7 November 2001) 2.

¹¹⁷⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

¹¹⁷⁷ E Southwood, 'Extending the *Kable* Doctrine: *South Australia v Totani*' (2011) 22 *Public Law Review* 83, 95.

¹¹⁷⁸ *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531.

¹¹⁷⁹ P Cane, 'Merits Review and Judicial Review — the AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 237.

an apt embodiment of this impetus, necessitates court and community service interaction — a collaboration outside the strictures of the traditional judicial function — and thus reinforces and facilitates the notion of the law as a therapeutic agent.

(a) Therapeutic Jurisprudence Interdependence

The interdependence inherent in therapeutic judging, especially apropos of service provision, is arguably a matter that is the function of the executive. Therapeutic interdependence relies upon the ‘integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations.’¹¹⁸⁰ This teamwork approach applied in problem-solving courts may have the capacity to undermine the judicial independence from the executive.

(b) Multidisciplinary and Collaborative Treatment

The principle of judicial independence could be compromised by a judicial officer improperly seeking to adopt a therapeutic approach. The area where violation of the principle of judicial independence is most likely to occur in relation to judging in a problem-solving court is where judicial officers step into areas connected with determining service provision — a matter that is the function of the executive. Independence not only requires independence from government but also independence from all influences external to the court that might lead it to decide cases otherwise than on the legal and factual merits. Lord Bingham has stated that the principle of independence requires the judiciary to be

independent of anybody and anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.¹¹⁸¹

¹¹⁸⁰ Bruce J Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2003) 30 *Fordham Urban Law Journal* 1055, 1064.

¹¹⁸¹ Lord Bingham, *The Rule of Law* (Penguin Books, 2011) 92.

This statement of the principle of independence is particularly apt to problem-solving courts where therapeutic jurisprudence is implemented, as there is high potential for significant external pressures whereby the ‘traditional adversarial approach of court procedures [is] replaced by a collaborative style of case management.’¹¹⁸²

The problem-solving approach is interdisciplinary, informed by literature from psychology, psychiatry, clinical behavioural sciences, criminology, and social work.¹¹⁸³ There is a focus on ‘cooperative therapy rather than adversarial trials’¹¹⁸⁴ through the promotion of integration of treatment services with judicial case processing, close monitoring of, and immediate response to, behaviour, multidisciplinary involvement, and collaboration with community-based and government organizations. When ‘insights from the clinical behavioural sciences’¹¹⁸⁵ influence ‘the development of law’,¹¹⁸⁶ the legal system morphs to an ‘arena of multidisciplinary networks’.¹¹⁸⁷

Legal scholars are ‘striking out in a new, highly interdisciplinary direction’¹¹⁸⁸ that may threaten constitutional values. Promoters of therapeutic jurisprudence acknowledge that judicial collaboration is regarded as more important than judicial independence.¹¹⁸⁹ A teamwork approach, as used in problem-solving courts, is said to threaten judicial independence from the executive.¹¹⁹⁰ The judiciary may take or appear to take on executive roles, or the executive may appear to have too much influence on judicial

¹¹⁸² Jeffrey Tauber, ‘Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence’ in Melissa Bull, ‘Just treatment: Testing the Limits of Therapeutic Jurisprudence’ (Paper presented at 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006) 3.

¹¹⁸³ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

¹¹⁸⁴ Eric Cohen, ‘The Drug Court Revolution: Do We Want Theory Rather than Justice to Become the Basis of Our Legal System?’ (2003) 20 *Weekly Standard* 15, 20.

¹¹⁸⁵ David B Wexler, ‘Therapeutic Jurisprudence and the Culture of Critique’ (1999) 10 *Journal of Contemporary Legal Issues* 263, 273.

¹¹⁸⁶ Ibid.

¹¹⁸⁷ Dawn Moore, ‘Translating Justice and Therapy: The Drug Treatment Court Networks’ (2007) 47 *British Journal of Criminology* 57, 62.

¹¹⁸⁸ David B Wexler, ‘Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship’ (1993) 11 *Behavioral Sciences and the Law* 17, 21.

¹¹⁸⁹ P M Casey, ‘Position Paper on Therapeutic Jurisprudence’ (Paper presented at the Conference of State Court Administrators, Williamsburg, Virginia, 5 August 1999) 1.

¹¹⁹⁰ Donald J Farole et al, ‘Applying the Problem-Solving Model Outside of Problem-Solving Courts’ (2005) 89 *Judicature* 40, 55.

decisions or individual cases.¹¹⁹¹ This may also raise constitutional concerns about limitations on judicial power.¹¹⁹²

Introducing multidisciplinary teams into courts is required to address complex issues, but, in doing so, the rule of law becomes diffused. In such courts, deviations from the rule of law are considered ‘innovative [regarding] legal procedure and rules’.¹¹⁹³ It is noted that ‘in some instances fundamental legal and procedural safeguards may be diminished’.¹¹⁹⁴

The reaching of interdependent resolutions, informed by collaboration with agencies and professionals, is further problematic. When judges become the central focus of the effort as the enforcer of the treatment team’s decisions and ‘act in concert to identify and promote therapeutic values’,¹¹⁹⁵ rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. This challenges the valued notion of independence, further widening the gulf between natural justice and therapeutic justice.

(c) Therapeutic Outcome-Maximization

The altered forum also complements the aspiration to ‘connect defendants to therapeutic interventions including rehabilitative ... mental health treatment’.¹¹⁹⁶ The focus of the court is shifted from its traditional adversarial nature to issues of therapy, thereby ‘focusing on treatment and future improvements in a person’s mental health and general quality of life rather than on the criminal charge and assessing the level of culpability and

¹¹⁹¹ Ibid.

¹¹⁹² Michael S King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014).

¹¹⁹³ Mark Harris, ‘The Koori Court and the Promise of Therapeutic Jurisprudence’ (2006) (1) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 130, 134 <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>.

¹¹⁹⁴ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous (2002) 29 *Fordham Urban Law Journal* 2063, 2075.

¹¹⁹⁵ John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 893.

¹¹⁹⁶ Greg Berman and John Feinblatt, Good Courts: The Case for Problem-Solving Justice in Andrea Odegaard, ‘Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System’ (2007) 83 *North Dakota Law Review* 225, 227.

punishment’.¹¹⁹⁷ In other words, it is hypothesised that a rehabilitative response is conducive to generating therapeutic outcomes, along with ‘focus upon the maximization of the therapeutic consequences upon individuals.’¹¹⁹⁸

Therapeutic outcome-maximization upholds the notion that the law can be seen to act as a therapist, with legal rules, procedures and the roles of legal actors constituting ‘social forces’ that precipitate therapeutic or anti-therapeutic outcomes. Promoters of therapeutic jurisprudence refer to it as a form of court-intervention that focuses on the behaviour of criminal defendants in connection with the imposition of some form of treatment. While the traditional role of courts and judges is to provide a fair process in dispute resolution, under the therapeutic justice model ‘the process and the rules may be regarded as secondary, and what is preeminent is the provision of some form of treatment, and the outcome of that treatment’.¹¹⁹⁹

When the focus of the court is shifted from its traditional legal emphasis to issues of therapy, conflict with traditional legal outcomes ensues. For example, the importance of a fair process free of undue influence is subordinated to the attainment of desired therapeutic outcomes.¹²⁰⁰ Adopting the therapeutic perspective has been described as ‘remarkably anti-intellectual’¹²⁰¹ and ‘completely inimical to the judicial function’,¹²⁰² whereby the focus is ‘not to ensure that the litigants have a meaningful mental health experience’.¹²⁰³ While it is conceivable that the ‘legal system should consider but not simply defer to research conclusions regarding the therapeutic value of certain legal

¹¹⁹⁷ Nancy Wolff and Wendy Pogorzelski, ‘Measuring the Effectiveness of Mental Health Courts’ (2005) 11 *Psychology, Public Policy, and Law* 539, 554.

¹¹⁹⁸ LeRoy Kondo, ‘Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Jurisprudence for Mentally Ill Offenders’ (2001) 28 *American Journal of Criminal Law* 255, 265.

¹¹⁹⁹ P M Casey, ‘Position Paper on Therapeutic Jurisprudence’ (Paper presented at the Conference of State Court Administrators, Williamsburg, Virginia, 5 August 1999) 1.

¹²⁰⁰ *Ibid.*

¹²⁰¹ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch becomes the most dangerous’ (2002) 29 *Fordham Urban Law Journal* 2063, 2067.

¹²⁰² *Ibid* 2084.

¹²⁰³ *Ibid.*

principles or processes’,¹²⁰⁴ some ‘dispute the assumption that an attempt to obtain therapeutic outcomes should play a dominant role, or indeed any role in judicial decision making’.¹²⁰⁵

(d) Individual Rehabilitation

Authors Michael King, Arie Freiberg, Becky Batagol and Ross Hyams consider that the approach taken by problem-solving courts ‘reflects a realisation by courts and legislators that social problems may require social as well as legal solutions and that existing forms of judging need to be reconsidered’.¹²⁰⁶ Addressing individual underlying social or psychological problems associated with offending behaviour necessitates the adoption of approaches and outcomes that are best suited to each participant. In this manner, social sciences inform the judge’s role in achieving this end,¹²⁰⁷ thereby honouring the ‘enormous potential’ of law to heal.¹²⁰⁸

Regarding offenders, therapeutic jurisprudence seeks to ‘resolve the underlying problems that led to their court involvement in the first place’,¹²⁰⁹ thereby promoting offender-rehabilitation to the focus of the legal process. Those judging therapeutically develop an ‘orientation to the social value of their work’¹²¹⁰ and by dealing with the story behind a

¹²⁰⁴ John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 892.

¹²⁰⁵ John Petrila, ‘Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence’ (1992) 10 *New York Law School Journal of Human Rights* 877, 879; John Petrila, ‘A Review of Essays in Therapeutic Jurisprudence’ (1993) 10 *New York Law School Journal of Human Rights* 877, 879.

¹²⁰⁶ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 139.

¹²⁰⁷ James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?’ (2011) 35 *Melbourne University Law Review* 394, 396.

¹²⁰⁸ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

¹²⁰⁹ Richard Wiener et al, ‘A Testable Theory of Problem Solving Courts: Avoiding Past Empirical and Legal Failures (2010) 33 *International Journal of Law and Psychiatry* 417, 417.

¹²¹⁰ Kathy Mack and Sharyn Anleu, ‘Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices’ (2011) 37 *Monash University Law Review* 187, 189.

participant's offending, problem-solving court judges facilitate social solutions to social problems.¹²¹¹

Addressing societal issues, whereby courts become a 'one-stop' social problem-solving centre,¹²¹² fashioning solutions to social problems, gives them cause to turn to individual cases rather than case law and culturally relative positions in place of legal maxims. It is arguable that attempting to remedy societal problems, as opposed to observing the rules of natural justice, is futile. In the words of Judge Morris B Hoffman, it is a 'fiction that complex human behaviours can be dealt with as if they are simple diseases'.¹²¹³

The conventional positivist or formalist framework of the judicial role is usually understood to limit the ability of a judicial officer to address the wider social needs of those coming before a court. It is understood that 'a judiciary that concerns itself with offenders' social and psychological problems may undermine established legal principles'.¹²¹⁴ As Chief Justice John Doyle of the South Australian Supreme Court has stated, the judicial role

is to decide disputes [and to] administer justice according to law ... [and to] decide cases on the material presented. ... It is not for us to pursue social policies, or to press for social change. We have no charter to remedy social problems.¹²¹⁵

¹²¹¹ Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9.

¹²¹² Michael S King and Stephen Wilson, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32 (2) (March) *Brief* 23, 25.

¹²¹³ Morris B Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2063, 2064.

¹²¹⁴ Ann-Claire Larsen and Peter Milnes, 'A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders' (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1, 1 < <http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

¹²¹⁵ Chief Justice John Doyle, 'The Judicial Role in a New Millennium' (2001) 10 *Journal of Judicial Administration* 133, 136–7.

One of the claimed advantages of this limited approach to the judicial role is to insulate the legal actor from personal responsibility, as explained by author Candace McCoy:

[T]here is little to nothing the criminal justice system can do to alleviate poverty or the conditions that breed it. ... Economic structure and social attitudes cause inequality, and the justice system simply reacts to what is already there. ... [O]ur job is only to impose the rule of law carefully. ... We can do little more, because we can't change the world.¹²¹⁶

The reality is that no judge would be 'so smug as to claim to be able, let alone authorized, to solve all of modern society's ills'.¹²¹⁷ However, 'once all these social failures coalesce into an individual [offender], some judges suddenly think they can "fix" the individuals whose behaviour is a product of these failed systems'.¹²¹⁸ It would be misguided to think employing therapeutic jurisprudence in this way enables problem-solving enthusiasts to get to the 'causes' of the problems.¹²¹⁹ Judge Hoffman reasons: 'One link in the causal chain does not a cause make.'¹²²⁰

Justifiably, therapeutic jurisprudence does raise concerns about judicial integrity. However, it is not insensitive to established legal principles; nor does it advocate for their subordination to all therapeutic ideals. This discussion proceeds to consider the principle of legal certainty and the impact of enhanced discretion — evident in therapeutic judging — upon such certainty.

2 Certainty

Legal certainty¹²²¹ means that the State has the duty to respect and apply, consistently, laws it has enacted: 'like decisions ... given in like cases limits the discretion of judges'.¹²²² In a formalist context it is important that laws that confer a discretion on a State authority indicate the scope of that discretion, along with the manner of its exercise,

¹²¹⁶ Candace McCoy, 'Sentencing (and) the Underclass' (1997) 31 *Law and Society Review* 589, 591–2.

¹²¹⁷ Morris B Hoffman, 'Essay: Problem-Solving Courts and the Psycholegal Error' (2011) 160 *University of Pennsylvania Law Review* 129, 133.

¹²¹⁸ *Ibid.*

¹²¹⁹ *Ibid.*

¹²²⁰ *Ibid.*

¹²²¹ Frithjoh Ehm, 'The Rule of Law: Concept, Guiding Principle and Framework' (Paper presented at the Unidem Campus Trieste Seminar, Trieste, Italy, 12-15 April 2010) 9.

¹²²² John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 209.

and with sufficient clarity. Moreover, legal certainty requires respect for the principle of *res judicata* whereby the judgment of a court of competent jurisdiction is ‘final and conclusive as to the rights and duties of the parties involved’, constituting ‘an absolute bar to a subsequent suit for the same cause of action’.¹²²³

In addition, it must be seen that the existence of conflicting decisions within a supreme court is contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence of their case law. The principle of legal certainty is essential to the public’s confidence in the judicial system and the rule of law.

(a) Therapeutic-Jurisprudence-Enhanced Discretion: Potentially Inequitable Decisions Threaten Certainty

[N]o discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.¹²²⁴

Individualized treatment arguably vests too much power and discretion in an individual judge and is not consistent with the rule of law.¹²²⁵ The rule of law is not only enforced by courts, it also controls the operation of courts themselves.¹²²⁶ Just as unchecked administrative discretion runs counter to the rule of law, so too does unrestrained judicial discretion. ‘[T]o live under the rule of law is not to be subject to the unpredictable vagaries of other individuals’,¹²²⁷ whether they be legislators, government officials or judges.

Proponents of therapeutic jurisprudence argue that rarely can there be certainty in the legal system and that in fact therapeutic jurisprudence work will increase the knowledge

¹²²³ Peter E Nygh, and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2002) 378.

¹²²⁴ Lord Bingham, *The Rule of Law* (Penguin Books, 2011) 54.

¹²²⁵ Philip Bean, ‘Drug Courts, the Judge, and the Rehabilitative Ideal’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 235, 235.

¹²²⁶ Murray Gleeson, ‘Courts and the Rule of Law’ (Paper presented at the Rule of Law Series, Melbourne University, 7 November 2001) 7.

¹²²⁷ Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 122.

base and thus enhance the quality of legal decision-making, even though its conclusions may lack certainty.¹²²⁸ However, various rules have emerged to direct the exercise of judicial discretion. These include: judges should find, interpret correctly and apply the appropriate legal rule;¹²²⁹ judicial decisions should be made according to legal standards, rather than undirected considerations such as fairness or policy;¹²³⁰ and judges should observe fidelity to the law, that is, the inherited, enacted and judge-made law, and not create what they perceive to be better law according to subjective or personal preference.¹²³¹ Similar cases should be treated similarly, save where objective differences justify differentiation.¹²³²

Under the ‘old’ concept of law, the ‘law’ was conceived of as judge-made and, before legal realism, as ‘judge-discovered’. Such judge-made law developed incrementally, on a case-by-case basis. Courts would carefully examine prior precedent, reason by analogy, and try to extract overarching principles from previously decided cases. More recently, judges have been explicitly willing to consider policy arguments in developing doctrine.¹²³³ With or without policy arguments, the overall goal of the common law is to achieve an intellectual coherence.¹²³⁴

The broader and more loosely textured a discretion, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the

¹²²⁸ Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy, and Law* 184, 196.

¹²²⁹ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 206–7; Roscoe Pound R, *An Introduction to the Philosophy of Law* (1954) 48; B J Preston, ‘The Art of Judging Environmental Disputes’ (2008) 12 *Southern Cross University Law Review* 103, 103–5, 107–8.

¹²³⁰ Murray Gleeson, ‘Courts and the Rule of Law’ (Paper presented at the Rule of Law Series, Melbourne University, 7 November 2001) 7.

¹²³¹ Owen Dixon, ‘Concerning Judicial Method’ in *Jesting Pilate* (2nd ed, William S Hein, 2nd ed, 1997) 157–158; Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4, 11.

¹²³² John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 208–9.

¹²³³ Edward L Rubin, ‘The Concept of Law and the New Public Law Scholarship’ (1991) 89 *Michigan Law Review* 792, 802.

¹²³⁴ *Ibid* 833.

antithesis of the rule of law.¹²³⁵ Discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.

Therapeutic jurisprudence is considered to advance in a manner ‘that is catalytic rather than preclusive’;¹²³⁶ however, by extending the discretionary powers for sentencing judges, the chances of inequitable decisions increase. That is to say, increased judicial discretionary powers, outside legislated parameters, increase the possibility of two offenders who have committed similar offences being issued with different sentences.

Judges require discretion within legislative limits to mobilize and preserve the concept of equality before the law. It is noted that ‘in some instances fundamental legal and procedural safeguards may be diminished’.¹²³⁷ This runs counter to the requirement of a level of legal certainty built on precedents, and overrides the traditional discretion that judges enjoy as keepers of the law and defenders of justice. Conventional approaches to sentencing already allow for a nuanced approach when dealing with offenders.¹²³⁸ Inappropriate use of judicial power is said to be justified because ‘judicial authority ... is not the only repository of wisdom’¹²³⁹— while true, such wisdom is subject to restrictions for good reason.

¹²³⁵ In *Scott v Scott* [1913] AC 417, 477, Lord Shaw commented: ‘To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand’.

¹²³⁶ *Baker v Vermont*, 744 A 2d 864, 888 (1999).

¹²³⁷ Ann-Claire Larsen and Milnes, Peter, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

¹²³⁸ See Natasha Bakht, ‘Problem Solving Courts as Agents of Change’ (2005) 50 *Criminal Law Quarterly* 224.

¹²³⁹ *Baker v Vermont*, 744 A 2d 864, 888 (1999).

The roles of legal actors in applying the therapeutic jurisprudence method are altered to such a degree as to pose an affront to the existing rules consistent with natural justice. Therapeutic lawyering obviates the hearing rule, as legal representatives in the therapeutic arena represent clients in a manner reflective of the therapeutic goals of the movement. Therapeutic judging does not sit comfortably within the confines of the bias rule, as the arbiter has an interest in advancing the well-being of the offender through interactive deliberations and collaborative solutions. Voice and validation are considered highly. Therapeutic jurisprudence concepts facilitate, indeed encourage, a variety of factors to be considered. Evidence is not considered in the light of the no-evidence rule above, where logically probative evidence is the standard. Therapeutic jurisprudence has incongruent values with those upheld by judicial integrity. The interdependence inherent in therapeutic judging, especially in relation to service provision, is a matter that is the function of the executive. The teamwork approach applied in problem-solving courts may have the capacity to undermine the judiciary's independence from the executive.

Therapeutic outcome-maximization is seen as paramount to the movement, and matters such as the importance of a fair process are not as revered. Furthermore, the emphasis on individual rehabilitation disavows the Diceyan principle of equality before the law. The judicial role is usually understood to limit the ability of a judicial officer to address wider social implications. Furthermore, the enhanced judicial discretion attaching to therapeutic jurisprudence application threatens the idea of judicial certainty by widening the scope for subjectivity and, consequently, arbitrariness. Indeed, 'the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress'¹²⁴⁰ is a contentious phenomenon, but certainly not a completely inappropriate or meritless one.

¹²⁴⁰ Bruce J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055, 1060.

The practicalities of integrating FLRT into the criminal justice system are not limited to its impact upon natural justice. Other valid implications include sentencing considerations and the actual use of fMRI equipment and data interpretation. These matters are now addressed.

III SENTENCING

The rationales supporting the imposition of punishment for criminal offences arise through common law principles as those prescribed in legislation that are to be considered by a sentencing court during the sentencing process. Retribution ensures the offender is adequately punished for the offence. Adequate punishment is a sentence that is proportional to the gravity of the offence. In sentencing, the degree of the seriousness of the offence, alongside other relevant sentencing considerations (including deterrence, rehabilitation and the safety of the community), are considered in determining an appropriate penalty for each defendant.

A General Deterrence

As a sentencing principle, general deterrence may have little or no relevance in determining the sentence where the defendant suffers a mental illness.¹²⁴¹ The rationale is that it would contribute little to the deterrence of the general public by making an example of a defendant suffering from a mental abnormality.

It is now accepted in all Australian jurisdictions that, for the purposes of sentencing, the principle of general deterrence may be given less weight where an offender is suffering from a mental illness or condition, on the basis that he or she is an inappropriate vehicle to use as an example to others.¹²⁴² In addition, a second line of emergent authority suggests that to justify a mitigation in the penalty imposed, the mental disorder or

¹²⁴¹ Mason-Stuart v R (1993) 61 SASR 204; R v Scognamiglio (1991) 56 A Crim R 81.

¹²⁴² Sally Traynor, 'Sentencing Mentally Disordered Offenders: The Causal Link' (Report No 23, Judicial Commission of New South Wales, September 2002).

disability must have some causative role in the commission of the offence so as to reduce the offender's culpability.¹²⁴³

Leniency in sentencing may be appropriate in a case where a person suffers a mental health disorder. Any such disability should be explained to the court in submissions on a plea of guilty. Where some causal connection exists between the mental health condition and the commission of the offence, the degree of moral culpability may be diminished, such as where the person has a low level of intellectual functioning due to retardation or brain damage or other malady beyond the person's control.¹²⁴⁴

B *Rehabilitation*

The principle of rehabilitation is given considerable weight in such cases, and the court is apprised of details of any treatment, counselling or beneficial change in medication that has occurred since the date of the offence.¹²⁴⁵ Where a program of treatment is available, or the offender has shown a willingness to address his or her condition — such as by seeking psychiatric treatment or counselling — this may be taken into account as demonstrating a willingness to accept responsibility and work towards rehabilitation. In such cases, a sentence may be structured in such a way as to best allow the offender to advance his or her path to rehabilitation.

In the Tasmania Mental Health Diversion List, the magistrate, when finalizing a matter, will take into account a number of different factors including: the defendant's compliance or otherwise with the bail order conditions, the defendant's level of engagement with relevant care and health service providers and the defendant's progress (in terms of his or her mental health issues) while involved in the diversion process. In delivering sentence, the magistrate retains the full option of sentencing orders available under s 7 of the

¹²⁴³ *R v Maddeford* (2001) 120 A Crim R 497.

¹²⁴⁴ See *Paparone v The Queen* (2000) 112 A Crim R 190; *R v Verdins* (2007) 16 VR 269.

¹²⁴⁵ *Mason-Stuart v R* (1993) 61 SASR 204.

Sentencing Act 1997 (Tas). Generally, successful or compliant diversion list participants can expect a lesser sentence than they would have received if they had their case heard on a regular court list.

In South Australia, where a defendant has successfully completed the program the court may treat the defendant's participation and achievements favourably, as relevant to leniency in sentence.¹²⁴⁶ However, the fact that a defendant has not participated in, or has performed badly in, or has failed to make satisfactory progress in, an intervention program cannot be treated as an aggravating factor relevant to sentence.¹²⁴⁷ Where a court sentences a defendant following participation in the diversion program, any applicable mandatory sentence must still apply.

In *R v Verdins*,¹²⁴⁸ the Court of Appeal of Victoria stated that mental impairment was relevant to sentencing in at least five ways. It could:

1. reduce the offender's moral culpability (but not his or her legal responsibility) for the offence — this could affect the weight given to just punishment and denunciation as purposes of sentencing the offender;
2. influence the type of sentence that could be imposed and the conditions under which the sentence could be served;
3. reduce the weight given to deterrence as a purpose of sentencing — this would depend on the nature and severity of the mental impairment and how this impairment affected the mental capacity of the offender at the time of his or her offending and at the time of sentencing;
4. increase the hardship experienced by an offender in prison if he or she suffered from mental impairment at the time of sentencing; and/or
5. justify a less severe sentence where there was a serious risk that imprisonment could have a significant adverse effect on the offender's mental health.

¹²⁴⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 10(5).

¹²⁴⁷ *Ibid* s 10(6).

¹²⁴⁸ (2007) 16 VR 269.

Judges and magistrates may consider the *Verdins* principles when sentencing an offender who has a mental impairment at the time of the offence and/or at the time of sentencing.

C *Treatment Reports*

At the sentencing phase, neuroscientific evidence is already contributing, and may continue to contribute, to the determination of sentences and treatment.¹²⁴⁹

This thesis suggests that a (neuro)psychologist will analyse an offender's performance during FLRT (over a course of several sessions). As they are, current imaging techniques show structural and functional features of an offender's brain and results of FLRT can show where impulsivity is being inhibited and potential changes in neural pathways. The results would then be interpreted by a neuropsychologist and provided in a report to the court for use in sentencing or as a progress report to the magistrate or judge (depending on the situation).

This suggestion would follow the process adopted in the South Australian Mental Health Diversion Program, where progress reports are provided by the Clinical Advisors (registered psychologists) to the Magistrate at approximately two month periods outlining progress, success and any difficulties or set-backs faced by the defendant for each review period. The court has discretion to extend the defendant's participation in the program beyond the usual six months where the defendant may benefit from a longer period of participation. At the end of the defendant's participation in the program, the court is provided with a report summarizing the defendant's progress and achievements during the course of the program. This report is considered during the subsequent sentencing of the defendant.

¹²⁴⁹ Owen D Jones and Francis X Shen, 'Law and Neuroscience in the United States' in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 360.

Further exploration into the compilation of such reports and their compliance with established policy considerations would be instructive when employing FLRT from the outset. This of course represents another practical implication of FLRT-integration that may be in the remit of a dedicated steering committee with expertise in existing reporting protocols, as well as their legal function and utility.

IV LIMITATIONS OF FLRT-INTEGRATION

This fascinating [neuroscientific] field needs to street a narrow path between exuberance and anxiety.¹²⁵⁰

This thesis acknowledges the limitations of the emergent science. One constraint to expanded use of neuroscientific evidence is the prohibitive costs of brain-scanning. To the extent that the costs of fMRI and other neuroscientific technologies drop significantly in the coming years, as brain-scanning facilities continue to quickly proliferate, it is anticipated that resource limitations will decline as a barrier to entry — both for researchers and for legal stakeholders.¹²⁵¹

At present, the utility of neuroimaging is limited due to its being inadequately understood, difficult to accurately interpret (as it displays a complex image depicting multiple variables, including medication, nutrition, and hormones), interpreted subjectively (as results are influenced by the views of the interpreter), and equivocal (as it does not provide an unambiguous depiction of brain activity whereby different scanners produce different results, affected by the way in which the subjects behave while being scanned). Images can be no better than the manner in which the researcher designed the specific task or experiment, deployed the machine, collected the data, analysed the results, and generated the images.¹²⁵²

¹²⁵⁰ Walter P Sinnott-Armstrong, ‘Neurolaw and Consciousness Detection’ (2011) 47 *Cortex* 1246, 1246.

¹²⁵¹ Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 349, 371.

¹²⁵² Ibid 356.

While fMRI can accurately measure changes in blood flow and oxygen levels, interpreting those changes as reliable indicators of particular types of thought, or as reliable indicators of what a region of the brain is actually doing, requires a series of inferential steps that are not entirely straightforward.¹²⁵³

The ability of fMRI to resolve the timing of brain activity is hampered by its reliance on the sluggish responses of blood vessels to changes in blood oxygenation. In contrast to the good spatial and poor temporal resolution of fMRI, electroencephalography (EEG) and magnetoencephalography (MEG) measure the tiny electrical or magnetic fields produced on the surface of the scalp by brain activity. As they measure electrical activity directly, they have much higher temporal resolution but relatively poor spatial resolution. As a consequence, neuroscientists sometimes use EEG/MEG in combination with MRI to secure converging evidence with complementary strengths in spatial and temporal information. These techniques therefore offer good, but still indirect, measures for what is actually happening in the brain. Findings from neuroscience will often need to be complemented with other techniques and approaches (such as behavioural observations) to reach rounded conclusions.¹²⁵⁴ It is important to note that this remains a relatively crude technology considering such imaging methods make use of highly processed blood-flow signals, which cover tens of cubic millimetres of brain tissue. In a single cubic millimetre of brain tissue, there are one hundred million synaptic connections between neurons.¹²⁵⁵

Individualized inferences from group-averaged neuroscientific data presents problems for courts.¹²⁵⁶ For instance, just because a particular pattern of neural activity is associated, on average at the group level, with impaired decision-making, it does not necessarily follow that a defendant before the court whose brain scans produce the same neural patterns necessarily has such a cognitive deficit. As neuroscientists begin to further

¹²⁵³ Ibid.

¹²⁵⁴ The Royal Society, 'Brain Waves Module 4: Neuroscience and the Law' (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011).

¹²⁵⁵ David Eagleman, *Incognito: The Secret Lives of the Brain* (Text Publishing, 2011) 173.

¹²⁵⁶ D L Faigman, 'Evidentiary Incommensurability: A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making' (2010) 75 *Brooklyn Law Review* 1115.

explore individual differences in brain activity,¹²⁵⁷ the ‘group to individual’ inference problem will remain central in applying neuroscience to law.¹²⁵⁸ Hence, ‘[a] treatment of [these clinical neuroimaging studies] that is either too glibly enthusiastic or over-critical will be damaging for this emerging science in the long run’.¹²⁵⁹

A *Cautionary Remarks about FLRT-Integration*

We should be neither so sceptical that we miss useful opportunities nor so enthusiastic that we undermine functioning institutions.¹²⁶⁰

This thesis acknowledges that there is a need to proceed with caution, and that ‘any experimental finding needs to be independently replicated, and be the result of adequate experimental design’.¹²⁶¹ Regarding neuroimaging and the frontal lobe work-out, ‘there are no verifiable peer reviewed results that validate this as the therapy of the future and the future of therapy’.¹²⁶² However, these neuroscientific insights may provide a new model in rehabilitation and certainly offer ‘an alternative to the belief that incarceration is the only way to deal with law-breakers’.¹²⁶³ Accordingly, ‘[a]ny employment of neuroscience would require legislated regulation to mitigate ... complex concerns’.¹²⁶⁴

¹²⁵⁷ A R Hariri, ‘The Neurobiology of Individual Differences in Complex Behavioral Traits’ (2009) 32 *Annual Review of Neuroscience* 225.

¹²⁵⁸ Owen D Jones and Francis X Shen, ‘Law and Neuroscience in the United States’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 349, 356.

¹²⁵⁹ Tor Wagner quoted in Regina Nuzzo, ‘Brain Scans Predict Which Criminals Are More Likely To Reoffend’ *Nature* (Online), 25 March 2013 <<http://www.nature.com/news/brain-scans-predict-which-criminals-are-more-likely-to-reoffend-1.12672>>.

¹²⁶⁰ Walter P Sinnott-Armstrong, ‘Neurolaw and Consciousness Detection’ (2011) 47 *Cortex* 1246, 1246.

¹²⁶¹ The Royal Society, ‘Brain Waves Module 4: Neuroscience and the Law’ (Policy Document No 05/11, Royal Society Science Policy Centre, December 2011) 5.

¹²⁶² T J Dawe, ‘Are You Controlled By Your Inner Pigdog? — The Neurobiology of Choice’ *Beams and Struts* (online), 13 March 2012 <<http://www.beamsandstruts.com/articles/item/842-pigdog>>.

¹²⁶³ Ibid.

¹²⁶⁴ Leanne Houston and Amy Vierboom, ‘Neuroscience and Law: Australia’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 18.

In keeping with the maintenance of a cautious approach, this thesis is similarly mindful of the perils of ‘neuromania’ and does not advocate neuroscientific insights with uncritical fervour. To be sure,

[t]he current engagement of the criminal justice system with now arriving neuroscience is messy, unsystematized, undertheorized, underinvestigated.¹²⁶⁵

A reformation of the entire criminal justice system is consequently not suggested either. Indeed, criminologists Lutze and van Wormer foreshadow the difficulties of adopting complex new technologies as part of attempts to reform offender treatment and corrections programs by reflecting on historical changes in rehabilitative approaches adopted by enthusiastic and well-meaning reformers.¹²⁶⁶ ‘Change often resulted in what was convenient to the existing institutions and their practices resulting in the abandonment of the components of the innovation that were too complex or required an expertise beyond the capabilities of the implementers.’¹²⁶⁷ Such a prediction seems particularly prescient with respect to complex technologies such as brain-based predictive measures. Despite their sophistication, none of these technologies may be expected to work as a magic bullet for the complex psychosocial, cultural, economic and other factors that precipitate and sustain antisocial behaviour, and all will require careful integration with other support mechanisms that are the key components of problem-solving courts. Moreover, such technologies will require advanced medical expertise and a theoretically coherent integrated treatment paradigm:

the first frontier of impact requires consideration of the relationship between science and law, and the conceptual limitations of using fMRI data. Even after settling these questions, and introducing legislation there would be consequences for many central tenets of justice in the legal system.¹²⁶⁸

¹²⁶⁵ Owen D Jones et al, ‘Law and Neuroscience: Recommendations Submitted to the President’s Bioethics Commission’ (2014) *Journal of Law and the Biosciences* 224, 226.

¹²⁶⁶ Faith E Lutze and Jacqueline G van Wormer, ‘The Nexus between Drug and Alcohol Treatment Program Integrity and Drug Court Effectiveness: Policy Recommendations for Pursuing Success’ (2007) 18 *Criminal Justice Policy Review* 226, 227.

¹²⁶⁷ Ibid 227–8.

¹²⁶⁸ Leanne Houston and Amy Vierboom, ‘Neuroscience and Law: Australia’ in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 18.

B *FLRT-Administration*

None of these applications is ready yet ... all are being pursued',¹²⁶⁹ and 'neurologic techniques will be subject to high levels of interrogation before it becomes a legal mainstay.'¹²⁷⁰

Another practical consideration relating to the integration of FLRT into the Australian criminal justice system is the training of clinicians to administer FLRT to offenders. As part of the crime-reduction effort, criminal justice agencies encourage interagency collaboration and promote staff-training and development.¹²⁷¹ Jurisdictions within Australia have developed significantly detailed program manuals that include detailed theoretical and empirical rationales, descriptions of therapeutic principles, and notes for facilitators on individual sessions. Mechanisms for staff-accreditation in the area of FLRT will need to be developed, and perhaps program integrity will need to be monitored through video reviewing of treatment sessions by supervising staff. Mechanisms for recording program-involvement would likely involve the documentation of program-inclusion, attendance and program-completion data. In keeping with good practice, processes for outcome-measures documentation would be useful to inform future clinical practice and further intervention needs.¹²⁷²

Similarly, Community Corrections Officers (CCOs) and Probation and Parole Officers (PPOs) would benefit from FLRT education and may indeed enhance the therapeutic outcomes of the treatment. It is suggested that those involved in offender supervision who utilize the social-learning theory of offending behaviour can effect behavioural change in offenders through pro-social modelling, positive reinforcement and problem-solving.¹²⁷³

¹²⁶⁹ Walter P Sinnott-Armstrong, 'Neurolaw and Consciousness Detection' (2011) 47 *Cortex* 1246, 1246.

¹²⁷⁰ Martyn Pickersgill, , 'Connecting Neuroscience and Law: Anticipatory Discourse and the Role of Sociotechnical Imaginaries' (2011) 30 *New Genetics and Society* 27, 34; N Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton University Press, 2007) 300.

¹²⁷¹ Yilma Woldgabreal, Andrew Day and Tony Ward, 'The Community-Based Supervision of Offenders from a Positive Psychology Perspective' (2014) 19 *Aggression and Violent Behavior* 32, 34.

¹²⁷² Ibid.

¹²⁷³ Ibid.

Furthermore, CCOs and PPOs are required to perform a variety of statutory functions in relation to the supervision of offenders in the community. They provide pre- and post-sentencing advice to the courts and the Parole Board regarding the management and compliance of offenders in the community. Those in offender supervisory roles gather and analyse relevant information for the submission of reports to the courts and the Parole Board, to assist them in determining whether offenders should be placed on community-based orders or recommended for parole.¹²⁷⁴

Correctional Officers manage a caseload of offenders and are responsible for assessing each offender's risks and needs in order to develop individual plans designed to address their offending behaviour. They work directly with offenders, but may also involve employers, families, significant others, and program service providers when developing goals and strategies to reduce the risk of the person reoffending. Officers monitor an offender's compliance with their court or Parole Orders and prepare breach documentation for consideration by the court or Parole Board as required.¹²⁷⁵ Knowledge of FLRT and its application would benefit offender supervisors in furtherance of a cohesive and holistic approach to offender-management and rehabilitation.

A multidisciplinary team would be involved in both the court procedure and the clinical administration of FLRT and would ideally be educated in FLRT eligibility and suitability. Eligibility refers to the availability of FLRT to offenders before courts of summary jurisdiction and higher courts. The imposition of FLRT as a court-mandated rehabilitative mechanism would be available both pre- and post-sentence. Legal stakeholders as well as clinicians would be aware of the categories of impulse-control and the appropriateness of the treatment to the specific offender and his or her plasticity capabilities.

Another practical implication of FLRT-integration is the inter-jurisdictional differences in justice-sector funding, sentencing and program infrastructure. Traditionally this has led to

¹²⁷⁴ Department of Correctional Services Northern Territory, *The Role of Probation and Parole Officers* (18 December 2012) <<http://www.correctionalservices.nt.gov.au/CommunityCorrections/TheRoleOfProbationAndParoleOfficers/Pages/default.aspx>>.

¹²⁷⁵ Ibid.

service gaps in forensic health services and inadequate connections between health and corrections services within jurisdictions.¹²⁷⁶ The federal government has made a commitment to a program of national mental health reform. This program recognizes the high incidence and cost of mental illness in Australia and the structural arrangements that inhibit effective and efficient mental health service delivery.¹²⁷⁷ In recognition of the consensus among international and Australian commentators regarding the high numbers of prisoners experiencing mental illness, FLRT may function as a support to this initiative, along with the employment of safeguards against previous failings.

C *FLRT is Not an Immediate Cure*

Relapse rates are common among those with a mental illness, especially if the individual is in remission but does not continually challenge negative thought patterns. For this reason, FLRT is on-going and is not an immediate ‘cure’.

‘The majority of neurofeedback studies employ a similar experimental framework and schedule.’¹²⁷⁸ The physiological target and response is defined: in the case of FLRT, the frontal lobe is anatomically specified as the region to be trained. As established in Chapter 2, neurofeedback of the physiological target response and measurement of subject performance involves the participant being presented with online information on the activity of the physiological target to be trained and he or she attempts to learn to control the activation in the target brain area through the use of mental strategies. Studies undertaken by Sulzer et al suggest that ‘feedback training may span several minutes, hours, or repeated sessions over days’.¹²⁷⁹

¹²⁷⁶ Natalia Hanley and Stuart Ross, ‘Forensic Mental Health in Australia: Charting the Gaps’ (2013) 24 *Current Issues in Criminal Justice* 341, 341.

¹²⁷⁷ Department of Health and Ageing, *National Mental Health Reform 2011–12* (6 June 2011) <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/nmhr11-12~nmhr11-12-newapproach>>.

¹²⁷⁸ J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386, 388.

¹²⁷⁹ Ibid.

Based on the work of Sulzer et al, it is suggested that a FLRT session would consist of five ‘runs’ or exercises, with each run being approximately 15 minutes in duration. A total of 10 sessions is considered appropriate.¹²⁸⁰ The overall aim is for a participant to practice volitional control activation in specific parts of the brain. The participant’s assignment then is to work on this brain activity and gain control over it using the given feedback. Studies in rt-fMRI studies have shown that learned control over brain activity in certain areas responsible for motor, sensory, cognitive and emotional processing can be acquired in relatively few neurofeedback sessions.¹²⁸¹

The experimental framework of neurofeedback studies also include ‘transfer after successful training’, which refers to the testing of a participant to demonstrate whether he or she is able to maintain the skill of controlling brain activation or performing a task in the absence of feedback and/or in a different setting or task.¹²⁸² Indeed, ‘in clinical applications an important goal will be to maintain skills practiced and acquired during rt-fMRI sessions and be able to apply them to real-life situations’.¹²⁸³

‘Testing of behavioural effects’ refers to whether a participant’s ‘learned effective regulation’ results in specific behavioural effects, typically before and after learning.¹²⁸⁴ It is reported that ‘off-line’ mental training between sessions could be advantageous towards accelerating learning.¹²⁸⁵ Anecdotal evidence provided by neuroscientist R Christopher deCharms suggests that when explicit strategies are suggested, offline coaching by the experimenters could also have a positive effect on participant motivation and performance.¹²⁸⁶ For sustained efficacy in impulse-control management, it is thus

¹²⁸⁰ K Shibata et al, ‘Perceptual Learning Incepted by Decoded fMRI Neurofeedback without Stimulus Presentation’ (2011) 334(6061) *Science* 1413, 1415.

¹²⁸¹ Janika Bockmeyer, ‘Probation and Effective Rehabilitation — An Alternative to Incarceration? Using Neuroscience to Facilitate Rehabilitation Methods’ (Maastricht Research Based Learning Project Research Papers No V, Maastricht University Faculty of Law, 2004) 75, 90.

¹²⁸² J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386, 388.

¹²⁸³ Ibid 390.

¹²⁸⁴ Ibid 388.

¹²⁸⁵ L Subramanian et al, Real-time Functional Magnetic Resonance Imaging Neurofeedback for Treatment of Parkinson’s Disease’ (2011) 31 *Journal of Neuroscience* 16309, 16311.

¹²⁸⁶ See J Sulzer et al, ‘Real-time fMRI Neurofeedback: Progress and Challenges’ (2013) 76 *NeuroImage* 386, 389.

crucial for an offender to practice the skills gained from FLRT-engagement — not only throughout the court-mandated treatment period, but beyond as well.

V CONCLUSION

This chapter has detailed some of the practical implications of integrating FLRT into the criminal justice system. FLRT is an example of therapeutic jurisprudence in practice, and its incorporation into a court system exercising the principles of natural justice was reviewed. The disparate natures of natural justice and ‘therapeutic justice’ generated a discussion about the role of lawyers and judges in a therapeutic context. The impact of therapeutic jurisprudence concepts upon judicial integrity, an important cornerstone in the administration of justice, was also considered. Sentencing principles and the utilization of treatment reports to monitor offender progress were explored. Limitations surrounding the use of fMRI equipment and data interpretation were also reviewed. The perils of ‘neuromania’ and criticisms of the emergent science were observed. Staff-training and clinical FLRT administration was briefly canvassed. This chapter also underscored the necessity of continued treatment and skill-maintenance and application outside of prescribed treatment to prevent a relapse into previous impulsive behaviours.

As the science develops, FLRT, through NeuroDiversion, has the potential to productively inform the law. In fact, scientific advancements better position stakeholders to shape law to achieve its criminal justice objectives. While there are practical difficulties to the incorporation and utilization of FLRT — and it is not a ‘cure all’ or panacea to the problem of impulse-control among offenders — they are not intractable, and do not, on the whole, outweigh the potential therapeutic benefit to the law that FLRT may present.

Despite the adoption of a different ‘craftsmanship in office’¹²⁸⁷ peculiar to the common law adversarial judge, the therapeutic jurisprudence approach need not be ‘dichotomous with traditional notions of open courts and natural justice’.¹²⁸⁸ It is to be borne in mind that the fact of judicial officers taking a therapeutic role does not entitle them to depart from the core function of judging and to stray into areas that are the province of the executive or community groups. It does not entitle them to transgress the constitutional principle of separation of powers or to engage in activities that are beyond their professional expertise. Further, it does not entitle them to be treatment-providers. A therapeutic approach to judging does not mean that other considerations are ignored in the process.¹²⁸⁹ All forms of judging should be conducted within constitutional limits and the confines of statutes and the common law. In therapeutic court programs that promote addressing underlying issues relating to the legal problem before the court, the judicial officer also must be mindful of the need to hold participants accountable for their actions, to protect team members and to promote the integrity of the program.¹²⁹⁰

¹²⁸⁷ Karl N Llewellyn, ‘Some Realism About Realism — Responding to Dean Pound’ in James L Nolan, *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 91.

¹²⁸⁸ Jelena Popovic, ‘Court Process and Therapeutic Jurisprudence: Have We Thrown The Baby Out With The Bathwater?’ (2007) 1 *eLaw Journal: Murdoch University Electronic Journal of Law* 60, 76 <http://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf>.

¹²⁸⁹ Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009), <<http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>> .

¹²⁹⁰ Ibid.

CHAPTER 8

SUMMARY, CONCLUSION AND RECOMMENDATIONS

I THESIS SUMMARY

This thesis has explored the possibility, and the theoretical and practical implications, of utilizing FLRT for impulse-control management in the rehabilitation of criminal offenders in Australia, with a view to reducing crime, the prison population and recidivism rates.

In recognition of the role of impulse-control in criminal offending, the general ineffectiveness of incarceration, and the prevalence of mental illness among offenders, NeuroDiversion — a concept born of neurolaw — has been proffered as an example of therapeutic jurisprudence in action. Therapeutic jurisprudence — ‘the study of the role of the law as a therapeutic agent’¹²⁹¹ — is concerned with therapeutic outcome-maximization through collaborative treatment and individual rehabilitation to further the well-being of an offender. This thesis has argued that responsible incorporation of the rehabilitative mechanism of FLRT would advance the therapeutic agenda both generally and also specifically in relation to MHDCts in the diversion of mentally ill offenders away from the criminal justice system and into treatment.

It has been argued that the neural understanding of human behaviours has the potential to redefine offender-rehabilitation and address recidivism in support of societal reintegration for offenders. Proven to align with accepted models of offender-rehabilitation, FLRT perpetuates the holistic perspective of the GLM, whereby offenders are empowered to address their own rehabilitative needs. On this basis, FLRT is poised to provide an adjunctive role to existing offender-rehabilitation opportunities and mechanisms within the modern Australian criminal justice system.

¹²⁹¹ David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

FLRT-utilization for categorized impulse-control, as informed by the DSM-5, within Australian diversionary processes and methods and the regular criminal justice system advances the desirable goals of a mature, productively discriminating criminal justice system. Complemented by the NeuroDiversion test to determine the utility of FLRT for an offender suffering from poor impulse-control in the absence of a mental disorder, NeuroDiversion offers a nuanced and sophisticated approach to offender-rehabilitation. At the same time, it accentuates the importance of impulse-control management in criminal offending. In this way, it would be particularly beneficial if the public, lawmakers and practitioners in the mental health support and criminal law communities could ‘reconceive the nature of mental illness and ... imagine new responses to someone whose mental health problems are leading to run-ins with the law’.¹²⁹²

The jurisdictional ambit of the therapeutic practice of FLRT, it has been suggested, extends to the utility of FLRT as part of court-mandated rehabilitative treatment, rather than full diversion, for major indictable offences in superior courts in Australia. The use of FLRT in tribunals that assess the continued detention of both civilly committed and forensic patients, as well as those that determine issues of mental responsibility, have also been considered. Optimal FLRT-utilization may extend to other diversionary schemes, including police diversion, drug diversion and indigenous-specific diversionary programs. Youth offenders may also benefit from FLRT — in a diversionary capacity, as well as during detention and post-release. The value of FLRT in adult custodial programs and post-release programs has also been advanced.

The jurisprudential permissibility of integrating FLRT into the Australian criminal justice system also invited an examination of relevant theoretical considerations, such as reconciling the integration of customized rehabilitation for impulse-control management with traditional conceptions of punishment. The compatibility of the adversarial system

¹²⁹² R J Bonnie and J Monahan, ‘From Coercion to Contract: Reframing the Debate on Mandated Community Treatment for People With Mental Disorders’ (2005) 29 *Law and Human Behavior* 485; Henry T Greely, ‘Neuroscience and Criminal Justice: Not Responsibility But Treatment’ (2008) 56 *Kansas Law Review* 1103; H T Greely, ‘Law and the Revolution in Neuroscience: An Early Look at the Field’ (2009) 42 *Akron Law Review* 687.

with criminal law was also examined. This was in contrast to the reduced condemnatory emphasis inherent in non-adversarial systems, where therapeutic jurisprudence flourishes.

Rehabilitation theory and recidivism-reduction as theoretical impetuses to the scholarship of therapeutic jurisprudence were also considered, as was the relevance of international human rights theory and obligations to FLRT as a rehabilitative treatment for criminal offenders. The framework for applying human rights to correctional practice and its relevance to the strength-based approach to offender-rehabilitation, the GLM, was also explored. Specifically, it was emphasized that treating offenders with dignity is likely to result in greater treatment compliance and responsiveness,¹²⁹³ as ‘successful treatment is contingent upon promoting individuals’ well-being and ensuring that they are able to meet a multitude of important needs’.¹²⁹⁴ Indeed, working collaboratively with offenders in developing treatment goals is likely to result in a stronger therapeutic alliance. As the GLM literature confirms, ‘motivating offenders and creating a sound therapeutic alliance are pivotal components of effective treatment’.¹²⁹⁵

This thesis also addressed the ethical considerations of employing neuroscientific insights in the development and implementation of legal initiatives. The relevance of the rule of law and, more specifically, the notion of equality before the law, were examined. The integration of FLRT into the criminal justice system was also seen to generate practical implications. These were considered and they included the role of lawyers and judges acting in a therapeutic context, the impact of therapeutic jurisprudence concepts upon judicial integrity, and the limitations (both fiscal and functional) of fMRI equipment. Matters relevant to staff-training and FLRT-administration in a clinical setting were also deliberated. It has also been emphasized that because FLRT is not a cure for impulsivity, treatment should be on-going to prevent relapse.

¹²⁹³ Tony Ward and Astrid Birgden, ‘Human Rights and Correctional Clinical Practice’ (2007) 12 *Aggression and Violent Behavior* 628.

¹²⁹⁴ Mary Barnao, Peter Robertson and Tony Ward, ‘Good Lives Model Applied to a Forensic Population’ (2010) 17 *Psychiatry, Psychology and Law* 202, 203.

¹²⁹⁵ Tony Ward and Mark Brown, ‘The Good Lives Model and Conceptual Issues in Offender Rehabilitation’ (2004) 10 *Psychology, Crime and Law* 243, 252.

As the chapters of this thesis have revealed, integrating FLRT into the Australian criminal justice system demonstrates how the law can use mental health information to improve therapeutic functioning without impinging upon justice concerns.¹²⁹⁶ Although the work of many judicial officers presiding over problem-solving courts mainly resides in court processes rather than adversarial trials, the greater involvement of the judicial officer necessitated by problem-solving courts may threaten the notion of judicial impartiality. However, if specific criteria are laid down by the rules relating to a court program concerning the use of rewards and sanctions, and if the judicial officer applies those rules dispassionately, then, it is suggested, there should be little cause for concern. In terms of judicial involvement in planning, this most commonly relates to matters concerning the court program or associated matters. It is appropriate for a judicial officer to provide input into matters concerning the court and its program given the unique status and role of the judicial officer in such programs.

Undeniably, when employing natural justice and therapeutic justice simultaneously, the courts traverse difficult terrain. Adopting a more informal approach and engaging with the court to actively and collaboratively promote individual rehabilitation doubtless challenges matters surrounding judicial independence, impartiality and certainty. Indeed, judging in a matter that promotes law a therapeutic agent is arguably exigent. However, it is not impossible for the discerning judge to act therapeutically, thereby enhancing the therapeutic value of the law while respecting and observing fairness and good justice. Advocates for therapeutic jurisprudence concur with Magistrate King who states that 'judging is not static', for many forms and active judicial case-management are now widely accepted within a conventional adversarial framework of legitimacy.¹²⁹⁷ This can be ensured by the discretion and deliberations of a magistracy and judiciary who willingly apply the therapeutic lens *and* observe existing rule-of-law principles.

¹²⁹⁶ David B Wexler, 'Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship' (1993) 11 *Behavioral Sciences and the Law* 17, 21.

¹²⁹⁷ Michael S King, 'The Therapeutic Dimensions of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 94.

This thesis has endeavoured to promote neurolaw as a valid avenue to address areas of deficiency within the ambit of offender-rehabilitation and it concludes that the incorporation of this neuroscientific insight may enhance the efficacy of the criminal justice system in terms of reducing recidivism and increasing offender-rehabilitation for the betterment of society. As a practical recidivism measurement, FLRT furthers the notion that sanctions and incarceration alone are unlikely to reduce rates of reoffending¹²⁹⁸ and may even result in increased recidivism,¹²⁹⁹ because punishment-oriented treatments for offenders are deemed ineffective and do not reduce the number of reoffenders.¹³⁰⁰

II FUTURE RECOMMENDATIONS — SHAPING THE FUTURE OF NEUROLAW

Professor Hank Greely suggests that it is not too early to talk about neuroscientific issues¹³⁰¹ and that they ‘should be discussed and debated well before existing techniques and technologies are further refined’.¹³⁰² This ‘may also help to funnel resources towards research and development of those interventions which are (even at a conceptual level) likely to achieve their aims, and which (at a normative level) are likely to be permitted and maybe even endorsed, recommended, requested and required’.¹³⁰³ Neuroscientific results are currently considered more prejudicial than probative in the courtroom, but, with time, it is predicted that the findings will become sufficiently robust to be used in legal proceedings.¹³⁰⁴ It is anticipated that the future of neurolaw will include the development of applications for law and policy, such as prediction tools and data-based

¹²⁹⁸ J Cid, ‘Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions’ (2009) 6 *European Journal of Criminology* 459.

¹²⁹⁹ M K Chen and J M Shapiro, ‘Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach’ (2007) 9 *American Law and Economics Review* 1; P Smith, C Goggin and P Gendreau, ‘The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences’ (Public Works and Government Services Canada, University of New Brunswick, 2002).

¹³⁰⁰ F T Cullen, ‘It’s Time to Reaffirm Rehabilitation’ (2006) 5 *Criminology & Public Policy* 665.

¹³⁰¹ H T Greely, ‘Direct Brain Interventions to Treat Disfavored Human Behaviors: Ethical and Social Issues’ (2012) 91 *Clinical Pharmacology and Therapeutics*, 163, 165.

¹³⁰² Nicole A Vincent, ‘Neurolaw and Direct Brain Interventions’ (2014) 8 *Criminal Law and Philosophy* 43, 49.

¹³⁰³ Ibid.

¹³⁰⁴ M S Gazzaniga, R B Ivry and G R Mangum, *Cognitive Neuroscience* (New York, 3rd ed, 2008).

interventions of treatment and punishment.¹³⁰⁵ In particular, it is recommended that further insight be directed towards neurolegal harmonization, public education and judicial education. This may assist in the promotion of a neuroscientific footing for therapeutic jurisprudence. It would also be productive if FLRT administration could be recognized in the existing best practice guide for jurisdictions seeking to implement successful mental health court and diversion programs. These matters are addressed in turn.

A Neurolegal Harmonization

As neuroscientific techniques push therapeutic boundaries with respect to invasiveness and irreversibility, concerns arise about protecting an individual's autonomy and due process rights when rehabilitative treatments are offered and delivered via the coercive powers of the criminal justice system.

As long as the criminal justice system is a primary mode of delivering treatment and rehabilitation through quasi-judicial institutions such as MHDCts, policy-makers and stakeholders must establish clear and consistent guidelines that protect each individual's constitutional rights. Relevant rights include the right to refuse medical treatment, the right to retain effective counsel, the right not to be subject to disproportionate punishment, and the right to make informed and voluntary decisions about one's criminal defence and/or participation in a MHDCt. The integration of therapies that are directly invasive into neural systems heightens the necessity for MHDCts to articulate how their operation accords with established legal principles and with adequate safeguards to, inter alia, constitutional rights and individual autonomy. This will also help quieten scholars who spar over the benefits of therapeutic jurisprudence and the risks of institutional overreach.

¹³⁰⁵ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 82.

B *Public Education*

We need to do a much better job of educating people about what neuroscience is, including its methods and limitations.¹³⁰⁶

Arguably, the most important arena in which a greater knowledge of neuroscience is needed is the criminal justice system,¹³⁰⁷ and legitimacy of the legal system will depend upon public acceptance of the proposed neuroscientific technology.¹³⁰⁸ The public may question whether the law is the appropriate mechanism for actualizing offender well-being through the administration of FLRT, ‘especially given the function of legal language, thought, logic and reasoning’,¹³⁰⁹ and we may further question ‘whether it can be persuasively argued that law is “healthy for people”’.¹³¹⁰ It is necessary to reassure the public that justice is being served when a matter such as this requires attention.¹³¹¹ Gummow CJ (as he then was) has said that the maintenance of public confidence in the administration of justice ‘in present times, is the meaning of the ancient phrase, “the majesty of the law”’.¹³¹²

C *Judicial Education*

Judges’ chambers are the crucible for th[e] interaction between neuroscience and law.¹³¹³

As the field of law and neuroscience expands, it will require new training for judges.¹³¹⁴ Already a significant number of Federal and State judges in the United States of America

¹³⁰⁶ Joshua Buckholtz quoted in Kayt Sukel, ‘Will Neuroscience Challenge the Legal Concept of Criminal Responsibility?’ (Briefing Paper, The Dana Foundation, May 2011).

¹³⁰⁷ Robert M Sapolsky, ‘The Frontal Cortex and the Criminal Justice System’ (2004) 359 *Philosophical Transactions of the Royal Society of London Biological Sciences* 1787, 1788.

¹³⁰⁸ B J Shapiro, “‘To A Moral Certainty’: Theories of Knowledge and Anglo-American Juries 1600–1850’ (1986) 38 *Hastings Law Journal* 153.

¹³⁰⁹ Bruce A Arrigo, ‘The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime’ (2004) 11 *Psychiatry, Psychology and Law* 23, 32.

¹³¹⁰ D R Fox, ‘Psychological Jurisprudence and Radical Social Change’ (1993) 48 *American Psychologist* 234.

¹³¹¹ David Malcolm, The Application of Therapeutic Jurisprudence to the Work of Western Australian Courts (2007) 17 *Journal of Judicial Administration* 127, 130.

¹³¹² *Mann v O’Neill* (1996–97) 191 CLR 204, 245.

¹³¹³ Kayt Sukel, ‘Will Neuroscience Challenge the Legal Concept of Criminal Responsibility?’ (Briefing Paper, The Dana Foundation, May 2011).

have sought training in the area.¹³¹⁵ The Dana Foundation in the United States of America funds a grant to the American Association for the Advancement of Science to hold seminars for judges on emerging issues in neuroscience.¹³¹⁶ In addition, the Law and Neuroscience Project at Vanderbilt University in Nashville, Tennessee, has partnered with various institutes and research networks¹³¹⁷ to sponsor major conferences for American judges. The topics covered at the conferences included, among other things: an introduction to neuroscience; presentations on frontal lobe function, including decision-making, behavioural control and counter-factual thinking; and presentations on measuring individual variation and subjective states, including lie detection, pain assessment and punishment.¹³¹⁸ Indeed, as Eagleman predicts:

lawyers and judges of the future will be handed a very different set of tools before entering their field. In addition to their current studies of legal history and concepts, these future practitioners will also possess a bedrock understanding of science, mental illness ... opportunities for rehabilitation, and realistic ideas of how our brains process both ... good and bad decisions.¹³¹⁹

Acquainting judges, lawyers, legislators, legal scholars and the public with neuroscientific insights¹³²⁰ is one of the recommendations submitted to the President's Bioethics Commission:¹³²¹

The Commission should recommend federal funding for training programs to aid judges (as well as parole officers, others in the criminal justice system, and legal educators) in understanding the neurotechnologies (as well as related issues in science, hypothesis testing, and statistics) in order to improve the likelihoods of suitable decisions regarding proffers of neuroscientific evidence.¹³²²

¹³¹⁴ Owen D Jones and Francis X Shen, 'Law and Neuroscience in the United States' in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 371.

¹³¹⁵ Owen D Jones et al, 'Law and Neuroscience: Recommendations Submitted to the President's Bioethics Commission' (2014) *Journal of Law and the Biosciences* 224, 229.

¹³¹⁶ Ibid.

¹³¹⁷ For example, the Gruter Institute for Law and Behavioral Research, the Federal Judicial Center and the National Judicial College.

¹³¹⁸ Owen D Jones and Francis X Shen, 'Law and Neuroscience in the United States' in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 371.

¹³¹⁹ David M Eagleman and Sarah Isgur Flores, 'Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science' (2012) *Law of the Future Series No 1* 161, 171.

¹³²⁰ Owen D Jones and Francis X Shen, 'Law and Neuroscience in the United States' in T M Spranger (ed), *International Neurolaw: A Comparative Analysis* (Springer-Verlag, 2012) 372.

¹³²¹ Owen D Jones et al, 'Law and Neuroscience: Recommendations Submitted to the President's Bioethics Commission' (2014) *Journal of Law and the Biosciences* 224, 229.

¹³²² Ibid.

The Recommendations continue:

The Commission should call for development — perhaps under the auspices of a standing committee of the National Academy of Sciences — of “best practices” and advisable review mechanisms with respect both to the presentation of neuroscientific evidence in court and to its interpretation.¹³²³

In Australia, judicial training may include the application of the suggested NeuroDiversification test to determine the utility of FLRT for an offender in the absence of a mental disorder. Educating the judiciary in the execution of therapeutic change¹³²⁴ is ‘not an insurmountable obstacle’.¹³²⁵ Training in this area would prepare the judiciary for the vicissitudes of MHDCts and their idiosyncratic adjudication, without imperilling the rule of law, or ‘the predominance of the legal spirit’.¹³²⁶ It would be advantageous if Australia adopted this approach to neuroscience in general, and to FLRT specifically:

By being forced to become repeat players in specific areas, judges and lawyers are more likely to understand that the intersection of an individual’s motivations and capacities allows more refined treatment options, presumably with better societal and financial outcomes.¹³²⁷

D *Toward Collaboration between Lawyers and Scientists*

One of the future challenges for offender-rehabilitation providers in Australia is to ensure that a high standard of program delivery is maintained and that new programs are developed for particular offender groups. Crucial to these challenges is the enhancement of inter-jurisdictional resource-pooling and information-sharing.¹³²⁸ Moreover, the future

¹³²³ Ibid 230.

¹³²⁴ Michael S King, ‘Therapeutic Jurisprudence’s Challenge to the Judiciary’ (Research Paper No 2011/02, Faculty of Law, Monash University, 2011)

¹³²⁵ Susan Stefan and Bruce J Winick, ‘A Dialogue on Mental Health Courts’ (2005) 11 *Psychology, Public Policy, and Law* 507, 521.

¹³²⁶ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) (Macmillan, 5th ed, 1897) 186.

¹³²⁷ David M Eagleman and Sarah Isgur Flores, ‘Defining a Neurocompatibility Index for Criminal Justice Systems: A Framework to Align Social Policy with Modern Brain Science’ (2012) *Law of the Future Series No 1* 161, 169.

¹³²⁸ Karen Heseltine, Andrew Day and Rick Sarre, ‘Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia’ (Report No 112, Australian Institute of Criminology, 2011) x.

of neurolaw will be more productive if challenges to collaboration between lawyers and scientists can be resolved:¹³²⁹

We need to make sure that scientists understand the legal relevance of what they're doing well enough to be able to constructively contribute to discussions about it. Make sure that lawyers understand the science well enough not to have too much naïve faith in it or be too suspicious of it. Working together is going to guide us towards the right integration of science and law.¹³³⁰

Given that '[l]aw has some deeply rooted peculiarities of conception and method',¹³³¹ NeuroDiversification and the research comprising this thesis could encourage discussions among scientists and lawyers in an effort to collaboratively engage neurolaw questions in a process that 'satisfies both the rigorous demands of investigative science and the professional and ethical duties of the legal profession to produce results that further the interests of justice'.¹³³²

E *A Neuroscientific Basis to Aid Clarification of Therapeutic Jurisprudence Ambiguity*

Therapeutic jurisprudence reformers assume that a cause-and-effect relationship exists between therapeutic interventions and a decline in recidivism. Thus, to justify therapeutic jurisprudence on the basis of its effects on recidivist rates alone is purposeless and a far more persuasive measure is required.¹³³³ Accordingly, therapeutic reforms that attempt to deal with complex issues in the courts require careful consideration. Caution is advised in assuming that adversarial processes produce recidivism. As such, explanations for recidivism that focus on the pathologies of offenders have been found wanting.¹³³⁴

¹³²⁹ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 61.

¹³³⁰ Martha J Farah quoted in Kayt Sukel, 'Will Neuroscience Challenge the Legal Concept of Criminal Responsibility?' (Briefing Paper, The Dana Foundation, May 2011).

¹³³¹ Oliver R Goodenough and Micaela Tucker, 'Law and Cognitive Neuroscience' (2010) 6 *Annual Review of Law and Social Science* 61, 80.

¹³³² Ibid.

¹³³³ Ann-Claire Larsen and Milnes, Peter, 'A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders' (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1, 25 <<http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/76/42>>.

¹³³⁴ Ibid 5.

Difficulties are associated with measuring the therapeutic effect of a given rule. Therapeutic jurisprudence relies on social science theory and research, in particular mental health and behavioural work, to answer this question. However, social science has often proved inadequate to the task of investigating legal assumptions. Even if this general concern can be surmounted, the types of empirical questions that therapeutic jurisprudence asks may be difficult to answer.¹³³⁵ Hence, the indeterminacy of the empirical information on which therapeutic jurisprudence relies may be exacerbated by the paucity of its definition. The uncertainty of social science, although frustrating, does not vitiate its usefulness to the law.¹³³⁶

At its broadest, the word ‘therapeutic’ could simply mean ‘beneficial’, whereas ‘counter-therapeutic’ or ‘anti-therapeutic’ could mean ‘harmful’. Another definition of the word ‘therapeutic’ could be ‘beneficial’, in the sense of improving the psychological or physical well-being of a person. After all, enhancing individual welfare is the commonly understood intent of therapy. Under this definition, therapeutic jurisprudence becomes the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects:¹³³⁷

By incorporating promising behavioural science developments such as insights from research on rehabilitation into the day-to-day work of lawyers and judges, the law’s anti-therapeutic effects will be reduced.¹³³⁸

The imprecise words peculiar to the therapeutic language, such as ‘healed’, ‘restored’ and ‘cured’, are ‘simply incapable of being subjected to rigorous testing’,¹³³⁹ thereby rendering unusually uncertain the social science generated by therapeutic jurisprudence.

¹³³⁵ Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 *Psychology, Public Policy, and Law* 193, 204.

¹³³⁶ David Faigman, ‘To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy’ (1989) 38 *Emory Law Journal* 1005, 1026–39.

¹³³⁷ Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 *Psychology, Public Policy, and Law* 193, 196.

¹³³⁸ See Bruce J Winick, ‘A Therapeutic Jurisprudence Model for Civil Commitment’ in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 24.

¹³³⁹ Morris B Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous’ (2002) 29 *Fordham Urban Law Journal* 2063, 2070.

In this way, therapeutic jurisprudence is likely to remain more in the sphere of the speculative rather than the definitive. Regarding the inexact nature of the philosophy, it is opined that ‘in the maturation phase of therapeutic jurisprudence those who identify its advantages have an intellectual responsibility to be clear about the parameters and limits of therapeutic jurisprudence’.¹³⁴⁰ The explication of neuroscientific insights gives credence to therapeutic jurisprudence as a relevant foundation to MHDCts and rehabilitation promotion.

F *The Existing Best Practice Guide*

It may be plausible for FLRT to be assimilated into the existing ‘best practice guide’ for jurisdictions seeking to implement successful mental health court and diversion programs. Reproduced in an Australian Institution of Criminology publication,¹³⁴¹ this guide integrates two frameworks — one from Steadman, Morris and Dennis,¹³⁴² and another from Thompson, Osher and Tomasini-Joshi¹³⁴³ — into 11 elements of successful mental health court and diversion programs. It contains the following principles:

- Integrated services (multidisciplinary approach integrating mental health and social services with the criminal justice system);
- Regular meetings of key agency representatives (administrative meetings regarding program-operation and funding and meetings between service-providers and stakeholders about individualized treatment plans);

¹³⁴⁰ Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2008) 30 *Thomas Jefferson Law Review* 575, 576.

¹³⁴¹ Australian Institute of Criminology, ‘Court-Based Mental Health Diversion Programs’ (Tipsheet No 20, Australian Institute of Criminology, June 2011) 1.

¹³⁴² H Steadman, S Morris and D Dennis, ‘The Diversion of Mentally Ill Persons from Jails to Community-Based Services: A Profile of Programs’ (1995) 85 *American Journal of Public Health* 1630.

¹³⁴³ M Thompson, F Osher and D Tomasini-Josh, ‘Improving Responses to People with Mental Illnesses: Essential Elements of a Mental Health Court’ (Council of State Governments Justice Centre, New York, 2007).

- Strong leadership (appointment of program director/co-ordinator with excellent communication skills and an awareness and understanding of all elements of the mental health diversion program);
- Clearly defined and realistic target population (clear eligibility criteria suitable to the treatment-capacity of the community and offenders' circumstances);
- Clear terms of participation (clear terms of program-participation and individualized to suit offenders' circumstances);
- Participant-informed consent (decision to participate based on offenders being fully informed about the process and the consequences of participation — this can be facilitated through rigorous legal representation, specially trained case managers and/or the presence of an advocate);
- Client confidentiality (notwithstanding mandatory reporting requirements, confidentiality and privacy of offenders must be preserved);
- Dedicated court team (development of a team of court staff who are trained in the identification and management of a broad range of mental health issues);
- Early identification (identification of suitable participants to be made at the earliest possible stage of offenders' interactions with the criminal justice system);
- Judicial monitoring (participant program engagement is closely monitored by the court and subject to sanctions and rewards); and
- Sustainability (formalization and institutionalization of the program to ensure long-term sustainability).

If FLRT-availability were to be considered within these 11 elements of successful mental health court and diversion programs, it would further promote awareness of the role of impulse-control in offending and solidify attempts to manage its implication in the aetiology of criminal offending.

III CONCLUDING REMARKS

The ultimate conclusion of this thesis returns to Holmes' sentiment cited in Chapter 2, namely, that '[t]he life of the law has not been logic';¹³⁴⁴ rather, 'it has been experience'.¹³⁴⁵ It is this 'experience' and 'intuitive sense of justice'¹³⁴⁶ that NeuroDiversification captures: integrating FLRT — which relies upon the 'exquisite capacity of the human brain to process information that is both externally and internally derived'¹³⁴⁷ — as a rehabilitative treatment for criminal offenders represents a natural extension of the many diversion mechanisms already implemented in Australia. The success of diversionary mechanisms is inferred from their proliferation and perpetuation. Through their rehabilitative emphasis, problem-solving courts reflect societal needs and advancements and it may well be that therapeutic jurisprudence is well on its way to forming part of the 'judicial lexicon'.¹³⁴⁸ FLRT represents but one of the 'types of interventions in problem-solving courts [which include] motivational interviewing'.¹³⁴⁹ Consequently, accommodating FLRT into the current criminal justice system in Australia would not be deleterious or inconceivable, but rather may in fact may be felicitous to the concept (and administration) of offender-rehabilitation on the whole:

The legitimacy of the law itself depends on its adequately reflecting the moral intuitions and commitments of society. If neuroscience can change those intuitions, then neuroscience can change the law.¹³⁵⁰

The aim of this thesis has been to examine the theoretical and practical implications of incorporating FLRT (under the auspices of NeuroDiversification) for impulse-control

¹³⁴⁴ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, first published 1881, 1991 ed) 1.

¹³⁴⁵ Ibid.

¹³⁴⁶ Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' (2004) 359 *Philosophical Transactions Of The Royal Society Of London: Biological Sciences* 1775, 1775.

¹³⁴⁷ David A Hoffman and Richard N Wolman, 'The Psychology of Mediation' (2013) 4 *Cardozo Journal of Conflict Resolution* 759, 770.

¹³⁴⁸ Shirley Abrahamson, 'Therapeutic Jurisprudence Appeal' (2000) 24 *Seattle University Law Review* 223.

¹³⁴⁹ H Blagg, 'Problem-Oriented Courts' (Research paper prepared for the Law Reform Commission of Western Australia Project No 96, Government of Western Australia, 2008) 16.

¹³⁵⁰ Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' (2004) 359 *Philosophical Transactions Of The Royal Society Of London: Biological Sciences* 1775, 1778.

management in the rehabilitation of criminal offenders in Australia. An invitation now exists to those more scientifically able and policy-equipped to germinate the seed planted and to foster its growth as merely another incremental step in the evolution of the law. The integration of FLRT and its therapeutic benefit may, in the words of the leading world expert in the field of neurolaw, Professor Owen Jones, ‘advanc[e] the pursuit of a maximally fair, rational, and effective criminal justice system’.¹³⁵¹

¹³⁵¹ Owen D Jones et al, ‘Law and Neuroscience: Recommendations Submitted to the President’s Bioethics Commission’ (2014) *Journal of Law and the Biosciences* 224, 226.

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